TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 164

WILLIAM H. BURTON, APPELLANT,

vs.

WILMINGTON PARKING AUTHORITY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

FILED JUNE 22, 1960
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[fol. 1]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON, Plaintiff,

vs.

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware,

and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Defendants.

COMPLAINT—Filed August 20, 1958

1. The plaintiff is a citizen of the United States and of the State of Delaware, resident in the City of Wilmington. He is among those classified as "colored persons," of Negro blood or ancestry.

2. (a) The defendant The Wilmington Parking Authority (hereinafter referred to as "The Authority") is a public body corporate and politic, an agency of the State of Delaware, created and established by the City of Wilmington in August, 1951, pursuant to an act of the General Assembly, to serve a public purpose, use and function, namely, the erection and maintenance of a public structure or facility for off-street parking of automobiles in the City of Wilmington, Delaware.

(b) The defendant Eagle Coffee Shoppe, Inc., is a corporation of the State of Delaware and is engaged in the business of operating a restaurant or dining room for the purveyance and sale of food and drink, principally for consumption on the premises.

3. (a) The Authority has erected and operates a parking facility on a rectangular plot of land in the center of the principal business area of Wilmington occupying 178 feet along the southerly side of Ninth Street from Shipley Street to Orange Street, between which streets it extends southwardly from Ninth Street about 350 feet.

[fol. 2] (b) Land upon which this facility is operated was purchased in part by advances of public funds of the City of Wilmington.

4. The Authority by act of the General Assembly is given power to lease portions of the first floor of its public facility for commercial use, solely, however, for the purpose of assisting in defraying the expenses of maintaining and operating its facility as a single self-sustaining governmental unit.

5. The Authority has determined that to make economically feasible the fulfilment of its public purpose, namely, the operation of an off-street parking facility as a self-sustaining governmental unit, it is necessary to lease a portion of the area of the facility for commercial purposes.

6. (a) In April, 1957, The Authority entered into a contract of lease with defendant Eagle Coffee Shoppe, Inc., which lease demises to the latter for a term of twenty years at an annual rental of upwards of Twenty-eight Thousand Dollars a portion of the said facility, or building, of The Authority solely for use and occupancy as a restaurant, dining room, banquet hall, cocktail lounge and bar; and said contract gives the lessee an option to renew its lease for a further term of ten years at the same rental.

(b) The lease provides, *inter alia*, that the lessee "shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority."

7. On August 14, 1958, plaintiff, after parking his automobile in the said facility of The Authority, proceeded to the said restaurant located in the said facility where he sought to purchase service of food and drink; but solely

because of his race, color and ancestry, plaintiff was refused such service by The Authority, acting through the instrumentality of its lessee, the defendant Eagle Coffee Shoppe, Inc., and by said lessee, using and occupying a portion of said public facility, maintained and operated by The Authority as a single self-sustaining governmental unit.

8. The conduct of the defendants in refusing plaintiff service in the restaurant in said governmental facility solely on the basis of plaintiff's color, race and ancestry is in pursuance of a policy, practice, rule, regulation, and usage adopted, consented to and acquiesced in by The Authority, is oppressive, unequal and discriminatory, and is conduct of an agency of the State of Delaware depriving [fol. 3] plaintiff of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

9. Plaintiff has suffered irreparable injury and faces irreparable injury in the future by reason of the discrimination herein complained of, and has no plain, adequate or complete remedy to redress the wrong and illegal conduct of defendants herein complained of, other than by this suit for declaration of rights and an injunction.

10. This is a class action authorized by Rule 23 (a) (3) of the Rules of the Court of Chancery of the State of Delaware, in that plaintiff is a member of a class so numerous as to make it impracticable to bring all members before the court, the character of the right which plaintiff seeks to enforce is several, there are common questions of law and fact affecting the several rights, and common relief is sought. For these reasons plaintiff brings this action in his own behalf and on behalf of all members of the class without specifically naming the members thereof.

Wherefore, plaintiff respectfully prays the Honorable Court that:

1. The Court enter a judgment or decree declaring the policy, practice, rule, regulation and usage of the defendants or either of them denying, by reason of color, race

or ancestry, to the plaintiff or any other person classified as colored or Negro the right and privilege to use and enjoy to the same extent and in the same manner as other persons the appointments, facilities and services of the said restaurant a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

2. The Court issue an injunction, temporary until final hearing and thereafter permanent, restraining the defendants, their officers, agents, members, employees, lessees, and attorneys, from denying, by reason of color, race or ancestry, to the plaintiff or any person classified as colored or Negro the right to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the said restaurant.

3. The Court allow plaintiff his costs and grant such other and further relief as to the Court may appear equitable and just and as the Court may deem necessary and proper in the premises.

William H. Burton, Plaintiff.

Louis L. Redding, Attorney for Plaintiff, 923 Market Street, Wilmington, Delaware.

[fol. 4] *Duly sworn to by William H. Burton, jurat omitted in printing.*

[fol. 4a] [File endorsement omitted]

[fol. 5]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

ANSWER OF THE WILMINGTON PARKING AUTHORITY—
Filed September 10, 1958

1. Admitted.

2. (a) Admitted.

(b) Admitted.

3. (a) This defendant admits that it has caused a parking facility to be erected on the plot of land mentioned in paragraph 3 (a) of the Complaint and that it operates the major portion thereof for public parking purposes. For further answer, this defendant alleges that certain portions of said facility are leased by this defendant to certain persons, firms or corporations who carry on private businesses therein, independent of supervision or control by this defendant.

(b) Admitted.

4. It is admitted that this defendant has the power to lease portions of said facility in the manner and for the purposes provided by 22 Del. C. c. 5.

5. Admitted.

6. (a) Admitted.

[fol. 6] (b) Admitted.

7. It is denied that defendant refused plaintiff any service. It is further denied that Eagle Coffee Shoppe, Inc., is an instrumentality, agent, servant or employee of defendant. The averment, so far as it purports to allege that any act of Eagle Coffee Shoppe, Inc., is the act of defendant, is denied. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment so far as the same concerns any act of plaintiff or Eagle Coffee Shoppe, Inc.

8. Denied.

9. Denied.

10. This defendant is without knowledge or information sufficient to form a belief as to the truth of this averment.

First Separate Defense

11. This defendant is informed and therefore avers that it has no power by reason of the provisions of the aforesaid lease referred to in paragraph 6 (a) of the Complaint or any law of the United States of America or The State of Delaware whereby it can limit, enlarge, regulate or otherwise define or control the patrons of its lessees carrying on private businesses in said facility.

Second Separate Defense

12. This defendant is further informed and therefore avers that by reason of the provisions of 24 Del. C., Section 1501, the defendant, Eagle Coffee Shoppe, Inc., has the right to refuse service to any member of the public on the grounds recited in said statute.

[fol. 7] Third Separate Defense

13. The Complaint fails to state a claim upon which relief can be granted.

Wherefore, this defendant prays that the Complaint herein be dismissed as to it with costs.

Clair John Killoran, North American Building, Wilmington, Delaware, Attorney for the Defendant, The Wilmington Parking Authority.

[fol. 7a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 8]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

ANSWER OF EAGLE COFFEE SHOPPE, INC.—
Filed September 10, 1958

1. Admitted.

2. (a) Admitted.

(b) Admitted.

3. (a) Admitted that The Authority has caused a parking facility to be erected on the plot of land mentioned in paragraph 3 (a) of the Complaint and that it operates the major portion thereof for public parking purposes. For further answer, this defendant alleges that certain portions of said facility are leased by The Authority to certain persons, firms or corporations who carry on private businesses therein, independent of supervision or control by The Authority.

(b) Admitted.

4. Admitted that The Authority has the power to lease portions of said facility in the manner and for the purposes provided by 22 Del. C. c. 5. Denied that the restaurant operated by the defendant, Eagle Coffee Shoppe, Inc., is operated as a portion of a governmental unit.

5. Admitted.

[fol. 9] 6. (a) Admitted.

(b) Admitted.

7. Defendant, Eagle Coffee Shoppe, Inc., is without knowledge or information sufficient to form a belief as to the truth of such averments as relate to acts done by the plaintiff.

It is denied that plaintiff was refused service by The Authority, or that defendant, Eagle Coffee Shoppe, Inc., is

the instrumentality, agent, servant or employee of The Authority.

It is denied that the aforesaid restaurant is operated as a part of a governmental unit. For further answer this defendant says that the aforesaid restaurant is operated by it as a private business free from supervision or control by The Authority.

8. Denied.

9. Denied.

10. Defendant, Eagle Coffee Shoppe, Inc., is without knowledge or information sufficient to form a belief as to the truth of this averment.

Second Defense

The Complaint fails to state a claim upon which relief can be granted.

Third Defense

1. 24 Del. C., Section 1501 provides as follows:

"No keeper of an inn, tavern, hotel or restaurant or other place of public entertainment or refreshment of travelers, guests or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers and would injure his business."

2. The defendant, Eagle Coffee Shoppe, Inc., is the [fol. 10] keeper of a restaurant operated by it as a private business and is not obliged by law to furnish refreshment to persons whose reception or entertainment would be offensive to the major part of its customers and would injure its business

3. The defendant, Eagle Coffee Shoppe, Inc., is therefore not bound to serve the plaintiff in its restaurant.

Fourth Defense

The defendant, Eagle Coffee Shoppe, Inc., is the keeper of a restaurant operated by it as a private business and is not bound by law to conduct its business in such a manner as is demanded by the plaintiff.

Wherefore, this defendant prays that the Complaint herein be dismissed as to it with costs.

Thomas Herlihy Jr., Attorney for the Defendant, Eagle Coffee Shoppe, Inc., 320 North American Building, Wilmington, Delaware.

[fol. 10a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 11]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, EAGLE COFFEE SHOPPE, INC.—Filed December 18, 1958.

The defendant, Eagle Coffee Shoppe, Inc., a corporation of the State of Delaware, by Thomas Herlihy, Jr., its Attorney, hereby moves for summary judgment in the above entitled cause dismissing the complaint on the following grounds:

1. That said defendant, Eagle Coffee Shoppe, Inc., is the keeper of a restaurant operated by it as a private business and is not bound by law to conduct its business in such a manner as is demanded by the plaintiff in the complaint filed in this case.

2. That a statute of the State of Delaware, 24 Del. C., Section 1321 provides as follows:

"No keeper of an inn, tavern, hotel or restaurant or other place of public entertainment or refreshment of travelers

guests or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers and would injure his business."

[fol. 12] That the defendant, Eagle Coffee Shoppe, Inc., as the keeper of a restaurant operated by it as a private business is not obliged by law to furnish refreshment to the plaintiff in view of the aforesaid statute.

3. The complaint fails to state a claim upon which relief can be granted.

Thomas Herlihy Jr., Attorney for Defendant, Eagle Coffee Shoppe, Inc., 320 North American Building, Wilmington, Delaware.

[fol. 12a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 14]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

THE WILMINGTON PARKING AUTHORITY'S MOTION FOR SUMMARY JUDGMENT—Filed January 5, 1959

Now Comes the defendant The Wilmington Parking Authority, by its attorney, Clair John Killoran, and moves the Court to grant summary judgment in favor of it and against the plaintiff, showing that there is no genuine issue as to any material fact and that it is entitled to such judgment upon the following grounds:

(1) The defendant Eagle Coffee Shoppe, Inc., carries on a private business in that portion of the facility leased to it, independent of any supervision or control by this defendant, and the Fourteenth Amendment to the United States Constitution is inapplicable to such business.

(2) The defendant Eagle Coffee Shoppe, Inc. is not an instrumentality, agent, servant or employee of this defendant.

(3) This defendant has no power by reason of its lease with the defendant Eagle Coffee Shoppe, Inc. or any law of the United States or the State of Delaware whereby it can limit, enlarge, regulate or otherwise define or control the patrons and policies of the said defendant.

[fol. 15] (4) By reason of the provisions of 24 Del. C. Sec. 1501 the defendant Eagle Coffee Shoppe, Inc. has the right to refuse service to any member of the public on the grounds recited in said statute.

Clair John Killoran, Bank of Delaware Building, Wilmington, Delaware, Attorney for Defendant, The Wilmington Parking Authority

[fol. 16a] [File endorsement omitted]

[fol. 17]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

AFFIDAVIT OF JAY C. POWNALL—Filed January 16, 1959

State of Delaware,
New Castle County, ss.

Be It Remembered that on this 14th day of January, 1959, personally came before me, the subscriber, a Notary Public for the County and State aforesaid, Jay C. Pownall, personally known to me to be such, who being by me first duly sworn, deposes and says as follows:

I am Chairman of The Wilmington Parking Authority, a body corporate and politic, created and existing pursuant to 22 Del. C. c. 5, as amended, and exercising powers of the State of Delaware as an agency thereof, and one of the defendants in the above entitled action. As Chairman,

I am authorized to make this affidavit in the behalf of the Authority. In such capacity, I am acquainted with the history, purposes, policies and administration of the Authority, and, in particular, I am acquainted with the Authority's present administration of the off-street parking facility on Ninth Street between Shipley and Orange Streets in Wilmington, Delaware.

[fol. 18] While the Authority enjoys power of condemnation pursuant to its enabling legislation, the land site of the Ninth Street facility was secured through negotiated purchases from the former private owners of the various parcels comprising the site. The parcel purchased from Diamond Ice & Coal Co. was paid for partly in Revenue Bonds of the Authority and partly in cash donated by the City of Wilmington, pursuant to 22 Del. C. c. 5 aforesaid. The other parcels comprising the facility site were paid for in cash borrowed by the Authority from Equitable Security Trust Company.

Subsequently, the City of Wilmington gave the Authority $1,822,827.69 which sum the Authority applied to the redemption of the Revenue Bonds delivered to Diamond Ice & Coal Co. and to the repayment of the Equitable Security Trust Company loan.

Upon expert consultation and advice, the Authority determined that the construction of the Ninth Street facility could not be financed by revenue from parking only and the proceeds of the sale of revenue bonds. The Authority was advised that bonds payable out of parking revenues only would not be saleable in the existing market. Long-term leases to responsible tenants of portions of the facility were necessary to provide additional revenue to meet debt service requirements and to make bond financing feasible. Accordingly, the public was invited to bid for rental spaces for private businesses in the facility. Among the private leases made was that of the defendant Eagle Coffee Shoppe, Inc. A copy of the Eagle lease is attached as Exhibit "A". The Ninth Street facility was finally constructed solely from the proceeds received from the sale of revenue bonds [fol. 19] issued and delivered on the sole credit of the Authority. The State of Delaware and the City of Wilmington

are not liable to any extent for the payment of the principal of and interest on said bonds.

As appears from the lease, the Eagle furnished substantially all of the finishings in the portion of the facility leased to it besides the fixtures and equipment incidental to its business. It is stipulated that the Eagle shall use the premises for a restaurant, dining room, banquet hall, cocktail lounge and bar and for no other use.

The Authority reserves no power under the lease to control or suggest the patronage policies of the Eagle. More particularly, the Authority has never instructed or advised or in any manner suggested to the Eagle any policy of admission or exclusion of the latter's patrons or any matter touching upon its patronage.

As stated above, the Authority has no legal power over the actions of the Eagle other than as expressed in the said lease, nor has the Authority ever exercised any de facto control over the Eagle's management or patronage policies. More particularly, the Authority did not direct, authorize or ratify the action of the Eagle alleged in the complaint in the above action relative to the plaintiff.

Jay C. Pownall

Sworn to and Subscribed before me the day and year first above written.

Zadoc A. Pool, Notary Public.

(Seal)

[fol. 20]

EXHIBIT "A" TO AFFIDAVIT OF JAY C. POWNALL

FORM OF LEASE

THIS AGREEMENT, made this 8th day of April, 1957, by and between THE WILMINGTON PARKING AUTHORITY, a public body corporate and politic, created by and exercising public powers of the State of Delaware as an agency thereof pursuant to the provisions of Chapter 5, Title 22, Delaware Code of 1953, as amended, hereinafter

called the Lessor, party of the first part, AND EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, hereinafter called the Lessee, party of the second part,

WITNESSETH:

For and in consideration of the mutual covenants and agreements hereinafter contained, the Parties hereto covenant and agree as follows:

(1) Lessor covenants and agrees that it will complete the construction of the building of which the leased premises form a part, as expeditiously as possible, which building shall be located on the property of the Lessor in the City of Wilmington, Delaware, on the Southerly side of Ninth Street extending from Shipley Street to Orange Street. That portion of the building hereinafter leased to the Lessee, and referred to as the leased premises, shall be finished by the Lessor substantially in accordance with the provisions of numbered paragraph 3 hereof.

(2) Lessor hereby demises and leases to Lessee on the terms and conditions herein contained that portion of the said building designated and delineated on Exhibit "A" attached hereto and made a part hereof. Said Lease shall begin upon the date when the leased premises are ready for occupancy, i.e., installation of fixtures by the Lessee, and shall continue until the expiration of twenty (20) years after the said date of the beginning of the term of this [fol. 21] Lease, or until the expiration of any renewal or renewals of said term pursuant to the option provided in paragraph (17).

(3)* Lessor will complete the decorative finishing of the leased premises and utilities therefor, without cost to Lessee, to the extent following:

(a) FLOORS—Vinyl asbestos tile on ground floor and mezzanine only. Ceramic tile floors in basement toilet (s). Concrete floors elsewhere.

* This paragraph to be phrased in final lease to conform with type of bid.

(b) WALLS—White plaster walls, with four inch (4") rubber base; ground floor and mezzanine. Tile wainscot and plaster walls in basement toilet (s). Concrete block and concrete walls in basement (s).

(c) CEILINGS—Hung acoustical tile in ground floor and mezzanine areas. Plaster in basement toilet (s). Concrete in other areas.

(d) STAIRS—Connecting different levels of each unit, such stairs not to exceed three feet (3') in width with wrought iron handrail.

(e) RAILINGS—Wrought iron railing along front of mezzanine and along upper level of basement.

(f) SHOW WINDOW FLOORS—Wood flooring two feet six inches (2'6") along Ninth Street and one foot two inches (1'2") along Shipley Street and Orange Street.

(g) ELECTRICITY—Panelboard will be furnished in basement of each unit. (Each unit will be separately metered and electricity for each unit will be payable by Lessee. All conduits, outlets, light fixtures and lamps must be installed by Lessee at Lessee's cost and expense.)

(h) HEATING—Plugged tees at ceiling of basement of each unit. (Heat will be furnished by Lessor without additional cost to Lessee, however, Lessee must install Lessee's own separate heat distribution system within the unit(s) leased.)

(i) AIR CONDITIONING—A capped two inch (2") drainage outlet for Air Conditioning will be provided for each unit. (The installation of the air conditioning system for each unit must be done by Lessee at Lessee's expense and Lessee shall be responsible for the costs of its operation and maintenance.)

(j) TOILET—Will be installed by Lessor as well as toilet exhausts in each unit. (The operating cost both for electricity and maintenance shall be paid by Lessee.)

[fol. 22] (k) WATER—Lessor will provide a three quarter inch (3/4") metered cold water line for each unit, terminating in rear of basement of each unit, with a one half inch (1/2") cold water extension to the area of Air Conditioning equipment. (Lessee shall at Lessee's cost and expense provide equipment to heat water for each unit and also shall pay for water consumed and a proportional sewer charge directly to the Water Department of the City of Wilmington.)

(l) DRAINAGE—Lessor will provide required drainage for toilet rooms and air conditioning equipment. (Any special drainage required by Lessee shall be installed by Lessee at Lessee's cost and expense.)

(m) GAS—Lessor will provide gas service in the boiler room. (Any individual unit service must be arranged by Lessee with the Delaware Power & Light Company at Lessee's cost and expense.)

(n)* UNIFORM LEVEL—Lessor will construct the ground floor level of stores No. 3 and No. 4 to the same ground floor level as store No. 3 as now established by the contract documents between the Lessor and its general contractor, McCloskey & Co.

[Marginal handwritten notation—J.A. 4/3/57]

The responsibility of the Lessor to complete decorative finishing and utilities is expressly limited as above set forth and all additional finishing and/or utility services desired by Lessee shall be done and provided by Lessee at Lessee's sole cost and expense, subject, however, to the provisions of Exhibit "B" attached and made a part hereof.

[Marginal handwritten notation—J.A. 4/3/57]

(4) Lessee covenants and agrees to pay to Lessor an annual rent of TWENTY-EIGHT THOUSAND SEVEN HUNDRED Dollars ($28,700.00) for and during the term of this Lease, payable monthly in advance on or before

* To be utilized if Lessor is to construct a combination of units on a uniform level.

the first day of each month in equal monthly installments of TWENTY-THREE HUNDRED NINETY-ONE & 67/100 Dollars ($2,391.67), except that the rent or rents for any renewal or renewals of said term shall be as provided in paragraph (17). In the event this Lease begins, as provided in paragraph (2), on a day other than the first day of the month of such beginning, the rent installment payable for such month shall be reduced pro rata according to the date of such day of beginning.

[fol. 23] (5) Lessee, upon performance of the covenants, agreements and conditions on its part provided herein, shall peaceably have, hold and enjoy the premises herein leased for the said term and any renewal or renewals thereof.

(6) Prior to occupancy of the leased premises by Lessee, all notices herein required to be given by Lessor to Lessee shall be sufficiently given when the same are mailed in writing to Lessee's principal office. All notices herein required to be given by Lessor to Lessee, subsequent to occupancy of the leased premises by Lessee, shall be sufficiently given when the same are left in writing upon the leased premises. All notices herein required to be given by Lessee to Lessor shall be in writing and sent by registered mail, addressed to Lessor's office in Wilmington, Delaware. The sole evidence of such notice by Lessee to Lessor for the purpose of ascertaining compliance with the terms and conditions of this Lease shall be a Registry Return Receipt signed by a member or agent of Lessor.

(7) Lessor shall, for and during the term of this Lease and any renewals thereof, make or cause to be made, at its own cost and expense, all necessary structural repairs to the leased premises; all repairs to the exterior surfaces, if any, of the leased premises, excluding store fronts; and all necessary repairs to the adjacent pavements; provided such repairs are not occasioned by the act or neglect of Lessee or its servants, agents or employees. Lessee shall make or cause to be made, at Lessee's own cost and expense, all repairs to said building and pavements made necessary by Lessee's own act or neglect.

(8) Lessor reserves the right to place, erect or construct, or cause to be placed, erected or constructed, suspended directional signs on the exterior of the leased premises, provided, however, no such directional sign shall interfere with or obscure any display sign or signs of Lessee:

(9) It is further agreed that, if during the term of this Lease or any renewal or renewals thereof the leased prem- [fol. 24] ises shall be destroyed, damaged or injured by fire, the elements, acts of God, structural defects or unavoidable casualties, or from any cause beyond the control of Lessee so as to be unfit for occupancy or the conduct of the business of Lessee, or if said premises are condemned, declared unsafe, directed repaired or rebuilt by a duly constituted governmental body, this Lease shall cease and determine at the option of Lessee and Lessee shall not be liable to pay rent from and after the time Lessee shall have surrendered possession of the leased premises to Lessor; provided, however, that if the injury or damage to, or the condition of the leased premises is such that Lessor can and does restore the premises, make the necessary repairs or comply with governmental order within ninety (90) days after the happening of such event, this Lease shall not be terminated, but the rent shall abate for that portion of the leased premises considered by Lessee untenantable or unsuitable for the conduct of Lessee's business while such condition exists and any rents paid in advance and abated hereunder shall be refunded by Lessor to Lessee. Any and all repairs, restoring and/or compliance with governmental order as provided in this paragraph shall be made by Lessor at its own cost and expense.

(10) Lessee covenants and agrees that Lessee shall, without demand:

(a) Pay the rents on the days and at the times and places that the same are payable; and if Lessor at any time or times accepts said rents after the same shall have become due and payable, such acceptance shall not excuse delay upon subsequent occasions, nor constitute or be construed as a waiver of any of Lessor's rights.

(b) Pay the cost of all repairs to the leased premises, except as provided in paragraph (7).

(c) Pay the costs of all maintenance, cleaning, electricity, water, gas, and air conditioning of the leased premises.

(d) Pay the costs of all replacements of all finishings and of all worn parts of equipment in the leased premises and any sign or signs of Lessee on the exterior of the leased premises.

(e) Pay the costs of all types of insurance on the portion of the building leased hereunder, which Lessee [fol. 25] desires, or which may be required by the terms of the Trust Indenture under which any revenue bonds of Lessor are issued, except fire and other casualty insurance which shall be placed by and paid for by Lessor. In addition, without expense to Lessor, Lessee shall protect Lessor "as its interests may appear" in any insurance placed by Lessee which in any respect is applicable to the leased premises. Lessee further agrees that should any insurance policies and/or certificates thereof tendered by it under this sub-paragraph be not acceptable to Lessor, Lessee shall cause such insurance policies and/or certificates to be made acceptable by the existing insurance carrier, or in lieu thereof, place such insurance with carriers whose policies and/or certificates are acceptable to Lessor.

(f) Remove all ice and snow from the pavements adjacent to the leased premises as well as from all entrances thereto and exits therefrom, and, further, shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority.

(g) Include sub-paragraph 10(f) in any sub-lease permitted hereunder.

(11) Lessee covenants and agrees that it shall do none of the following things without the consent and/or approval in writing of Lessor first had and obtained:

(a) Assign, mortgage or pledge this Lease or underlet or sublet or sub-lease the leased premises or any part thereof, or permit any other person, firm or corporation to occupy the leased premises or any part thereof; nor shall any assignee or sub-lessee without an additional written consent from Lessor assign, mortgage or pledge this Lease or such sub-lease, and without such consent no such assignment, mortgage or pledge shall be valid; provided, however, that Lessee may sub-lease without further approval than is contained herein any or all of the area leased hereunder to the following classes of tenants: Retailing of bakery goods, ..., ... * No assignment or sub-lease, if consented to in the manner aforesaid, shall in any manner relieve or release Lessee from the liability for the performance of any of the covenants of this Lease, and the responsibility and liability of Lessee hereunder shall continue in full force and effect until the expiration of the term hereby created and any renewals thereof. Any sub-leasing of departments in any store to be operated by Lessee or by any accepted sub-lessee in the leased premises or any sub-leasing of concessions therein shall not require the written consent of Lessor so to do.

(b) Use or permit to be used any part of the leased premises during the term hereof, or any renewal, for public parking.

[fol. 26] (c) Use the toilet rooms, water closets, and other water apparatus in the leased premises for any purposes other than those for which they were constructed, nor throw sweepings, rubbish, rags, ashes, chemicals, or other injurious substances therein.

(d) Use or operate any machinery which in Lessor's sole opinion is harmful to the building or disturbing to other tenants of the building.

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* Bidder will here insert the types of tenants to which it desires to make subleases without prior consent of Lessor.

(e) Place any weights in any portion of the leased premises which in Lessor's sole opinion are beyond the safe carrying capacity of the structure.

(f) Place, erect, or construct, or cause to be placed, erected or constructed, any sign or signs upon the exterior surfaces or surfaces of the leased premises. Lessor, however, covenants and agrees that it will not unreasonably withhold its approval of any sign or signs that Lessee desires to place, erect or construct upon the said surfaces of the leased premises. Nothing contained in this sub-paragraph shall be construed as limiting or affecting the right of Lessee to place temporary advertising upon glazed surfaces.

(g)* The Lessee will use and occupy the demised premises for the purpose of a restaurant, dining room, banquet hall, cocktail lounge and bar and for no other use and purpose.

(12) It is further agreed that Lessee during the term of this Lease of any renewal thereof, shall have the privilege from time to time of making such changes, alterations or improvements to the interior of the leased premises as it may deem proper for the purpose of its business; provided, however, no changes or alterations shall be made to the leased premises of a structural nature, except interior non-support curtain walls, without the plans and specifications of any such changes or alterations being first submitted to and approved and consented to in writing by Lessor. Any changes, alterations or improvements permitted hereunder, whether with or without the consent and approval of Lessor shall be made at the sole cost and expense of Lessee. It is expressly understood and agreed that Lessee in making any such changes, alterations or improvements shall in no manner and to no extent involve or place liability on Lessor, and in the event changes or [fol. 27] alterations or improvements to the interior of the leased premises are proposed by Lessee which require the

* Bidder will insert here a covenant not to use the leased premises except for a designated purpose or purposes.

consent and approval of Lessor, Lessor reserves the right to require of Lessee a bond or other indemnity as Lessor may deem necessary and proper for its protection and the protection of its property, and Lessee shall furnish any such bond or other indemnity before the commencement of any such changes, alterations or improvements. Upon the termination of this Lease or earlier removal by the Lessee all permanent changes, alterations, additions or improvements and which become a part of the building on the leased premises shall become the property of the Lessor without liability on its part to reimburse the Lessee for the same. Any temporary partitions, fixtures (including lighting fixtures) and all machinery and equipment, shelves, counters and other trade fixtures placed in the leased premises by the Lessee which do not actually become a part of the building on the leased premises may be removed by the Lessee therefrom, provided that the Lessee shall be responsible and pay for any repairs to said leased premises which shall be necessitated by reason of the removal by the Lessee of any such personal property.

(13) Except as otherwise herein specifically provided, it is further agreed that Lessor shall not be liable and Lessee hereby waives all claims for damages of any nature which may be sustained by Lessee resulting from any accidents in or about the building of which the leased premises are a part, resulting directly or indirectly from any act or neglect of any other lessee or occupant of the building of which the leased premises are a part, or of any other person, or resulting from any act of God, fire, the elements, strikes, riots, wars, or resulting from any cause beyond Lessor's control.

(14) It is further agreed that if Lessee during the term of this Lease or any renewal thereof:

(a) Does not pay in full any and all rents and payments herein agreed to be paid by Lessee within thirty (30) days after the same shall be due and payable; or

(b) Violates or fails to perform, or otherwise breaches any of the terms, conditions or covenants as set forth in sub-paragraphs (b), (c), (d) and (e) of

paragraph (10) hereof, and/or as set forth in subparagraphs (b), (c), (d), (e), (f) and (g) of paragraph (11) hereof, and any such violation or default is not made good by Lessee within thirty (30) days after written notice by Lessor to Lessee; or

[fol. 28]

(c) Violates or fails to perform or otherwise breaches any of the other terms, conditions or covenants contained in this Lease; or

(d) Vacates the leased premises without having first paid and satisfied Lessor in full for all rents and payments then due, or that may thereafter become due until the expiration of the then current term; or

(e) Is adjudicated a bankrupt, or makes an assignment for the benefit of creditors, or if a Court of competent jurisdiction, whether under proceedings instituted by Lessee or otherwise assumes jurisdiction of the assets of Lessee under any provision of the Bankruptcy Act as the same now is or hereafter may be amended, or if a receiver is appointed for Lessee, or if the personal property of Lessee in the leased premises shall be levied upon by any sheriff, marshal or constable,

Then, and in any of said events, at the sole option of Lessor:

(a) The whole balance of rent and payments and all costs to Lessor shall be taken to be due and payable and in arrears as if by the terms of this Lease said balance of rent and payments were on that date payable in advance; and

(b) This Lease and the term hereby created, or any renewal thereof, shall, at the sole option of Lessor, and without waiver of any other rights of Lessor contained herein, terminate and become absolutely void without any right on the part of Lessee to waive the forfeiture by the payment of any sum due or by the performance of any condition, term or covenant broken; and

(c) Lessor may enter the premises and without demand proceed by distress and sale of the goods there to be found to levy the rent and other payments and charges payable hereunder as rent and all costs and officers' commissions including watchmen's wages and constables' commissions, and in such case all costs, officers' commissions and other charges shall immediately attach to and become a part of the claim of Lessor for rent and payments, and any tender of rent and payments without said costs, commissions and charges made after the issue of the warrant of distress shall not be sufficient to satisfy the claim of Lessor; and

(d) If this Lease or any part thereof is assigned or if the premises or any part thereof are sublet, Lessee hereby irrevocably constitutes and appoints Lessor as Lessee's agent to collect the rents due from such assignee or sub-lessee and apply the same to the rent and payments due hereunder without in any way affecting Lessee's obligation to pay any unpaid balance of rent or payments due hereunder; and

(e) Lessor may lease said premises or any part or parts thereof to such persons, firms or corporations as [fol. 29] may in Lessor's discretion seem best, and Lessee shall be liable for any loss of rent or payments and other charges payable hereunder by Lessee for the balance of the then current term; and

(f) If the rent and payments shall remain unpaid on any day when the same ought to be paid, Lessee hereby empowers any prothonotary or attorney of any court of record to appear for Lessee in any and all citations which may be brought for said arrears of rent and payments, and to sign for Lessee an agreement for entering in any competent court an amicable action or actions to confess judgment against Lessee for all arrears of rents and payments, and for interest and costs together with an attorney's fee of five per cent (5%). Such authority shall not be exhausted by any one exercise thereof, but judgment may be con-

fessed as aforesaid from time to time as often as any of said rent and payments shall fall due or be in arrears; and

(g) Lessee hereby releases and discharges Lessor from all claims, actions, suits and penalties for or by reason of or on account of any entry, ejectment, confession of judgment, distraint, levy or sale, or the loss of goods and chattels left on the premises.

(h) All of the remedies hereinbefore given to Lessor and all rights and remedies given to Lessor by law and equity shall be at Lessor's option cumulative and concurrent. No determination of this Lease, or the taking or recovering of the leased premises shall deprive Lessor of any of its remedies or actions against Lessee for rent and payments due at the time, or which, under the terms hereof, would in the future become due and payable as if there had been no determination, nor shall the bringing of any action for rent or payments or breach of covenant, or the resort to any other remedy herein provided for the recovery of rent and payments be construed as a waiver of the right in Lessor to obtain possession of the leased premises,

(15) It is hereby covenanted and agreed, any law, usage or custom to the contrary notwithstanding, that Lessor shall have the right at all times to enforce the covenants and provisions of this Lease in strict accordance with the terms hereof, notwithstanding any conduct on the part of Lessor in refraining from so doing at any time or times; and further, that the failure of Lessor at any time or times to enforce its rights under said covenants and provisions strictly in accordance with the same shall not be construed as having a custom in any way or manner contrary to the specific terms, conditions, and covenants of this Lease, or as having in any manner modified the same.

[fol. 30] (16) In the event any real estate tax shall at any future time be payable on the leased premises, such tax shall be payable by Lessor.

(17) Lessee shall have the option to renew this Lease upon the ~~following terms and conditions~~:* same terms and conditions for a further term of ten (10) years, provided it satisfies the Lessor, in writing, any time during the existence of the first period of this Lease, but not later than six (6) months prior to the termination date of the first term of this Lease.

For and during such renewal term or terms provided in this paragraph, Lessee covenants and agrees to pay to Lessor an annual rental of TWENTY-EIGHT THOUSAND SEVEN HUNDRED Dollars ($28,700.00). Said rent shall be payable in advance on the first day of each month in equal monthly installments of TWENTY-THREE HUNDRED NINETY-ONE AND 67/100 Dollars ($2391.67). It is further provided that if said renewal [fol. 31] terms shall begin on a day other than the first day of the month of such beginning, the rent installment payable for such month shall be reduced pro rata according to the date of such day of beginning. During such renewal terms or any of them, Lessor shall be under no obligation to renew or replace finishings. Where necessary, such replacements and renewals shall be made by Lessee at its own cost and expense.

IN WITNESS WHEREOF, The Wilmington Parking Authority has caused this Lease to be executed by its Chairman and its corporate seal to be hereunto affixed and attested by its Secretary, and EAGLE COFFEE SHOPPE, INC. has caused this Lease to be executed by its President and the corporate seal to be hereunto affixed and attested by its Secretary, all on the day and year first aforesaid.

THE WILMINGTON PARKING AUTHORITY

By /s/ WILLIAM FEINBERG
Chairman

* Option clause to be inserted if applicable and contained in bid.

Signed, sealed and delivered in the presence of:

/s/ Barney Cantor

(Seal)

Attest /s/ Hubert S. Steer
Secretary

Eagle Coffee Shoppe, Inc.

By /s/ James Assimoss
President

/s/ Elizabeth Lafferty

(Seal)

Attest /s/ Andrew Assimoss
Secretary

[fol. 32]

Exhibit "A" to Lease

The Lessee is hereby authorized to make or cause to be made changes in and/or additions to the construction of the leased premises as described in the said Contract Documents between the Lessor and McCloskey & Co., and whether such changes and/or additions are structural or otherwise, as may be required by the Lessee and approved by the Lessor's Architect, provided all such changes and/or additions shall be made at the sole cost and expense of the Lessee, due credit, however, to be allowed Lessee by Lessor for any work mentioned in paragraph numbered 3 of this lease and/or in said Contract Documents applicable to the leased premises, which is not performed by the Lessor. The Lessor agrees to pay any credit due the Lessee as aforesaid as shall be certified by said McCloskey & Co., and approved by the Consulting Engineer and Architect of the Lessor, said payments to be made upon the Lessee completing any such changes and/or additions to be made by Lessee.

[Handwritten marginal notation—J.A. 4/3/57]

[fol. 32a] [File endorsement omitted]

[fol. 34]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

MOTION TO AMEND ANSWER OF EAGLE COFFEE SHOPPE, INC. TO SUBSTITUTE PARAGRAPH 7 OF THE FIRST DEFENSE—Filed February 9, 1959

Comes Now the defendant, Eagle Coffee Shoppe, Inc., in the above entitled cause, by its Attorney, and moves this Honorable Court, for leave to amend its answer by striking out paragraph 7 of the first defense and substituting in lieu thereof the following:

7. The defendant admits the refusal to serve the plaintiff because of his race, color and ancestry.

It is denied that the aforesaid restaurant is operated as a part of a governmental unit. For further answer this defendant says that the aforesaid restaurant is operated by it as a private business free from supervision or control by The Authority.

Thomas Herlihy Jr., Attorney for the Defendant, Eagle Coffee Shoppe, Inc., 320 North American Building, Wilmington, Delaware.

[fol. 35]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

ORDER GRANTING MOTION TO AMEND ANSWER OF EAGLE COFFEE SHOPPE, INC.—February 9, 1959

Upon consideration of motion filed in this cause by counsel for defendant, Eagle Coffee Shoppe, Inc., herein, it is this 9th day of February, A.D. 1959,

Ordered, that the said defendant, Eagle Coffee Shoppe, Inc., be granted leave to amend its answer filed herein by striking out paragraph 7 of the first defense and substituting in lieu thereof the following:

"7. The defendant admits the refusal to serve the plaintiff because of his race, color and ancestry.

It is denied that the aforesaid restaurant is operated as a part of a governmental unit. For further answer this defendant says that the aforesaid restaurant is operated by it as a private business free from supervision or control by The Authority."

William Marvel, Vice Chancellor.

[Handwritten notation]

The plaintiff consents to the amendment sought.

Louis L. Redding, Attorney for Plaintiff.

[fol. 35a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 36]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

AFFIDAVIT OF ROBERT W. ANDREWS—Filed February 16, 1959

State of Delware,
New Castle County, ss.

Be It Remembered that on this 13th day of February, 1959, personally came before me, the subscriber, a Notary Public for the State of Delaware, Robert W. Andrews, who, after being by me duly sworn according to law, did depose and say as follows:

"As a member of a voluntary citizens' organization, known as the Committee for Fair Practices, I am personally aware that there are many restaurants and eating places in Wilmington, Delaware, and in northern New Castle County, Delaware, including the eating establishments named in the attached list, titled "Schedul A," which practice and follow the policy of serving all persons without any distinction on account of race or color."

Robert W. Andrews

Sworn to and Subscribed before me the day and year aforesaid.

Rose G. Bernardo, Notary Public.

(Seal)

[fol. 37]

SCHEDULE A TO AFFIDAVIT

EATING ESTABLISHMENTS WHICH SERVE EVERYONE

Compiled by

COMMITTEE FOR FAIR PRACTICES

Airport Restaurant
New Castle, Delaware

Bus Center
Second and French Streets

Cafeteria
DuPont Highway

Chuck Wagon
Kirkwood Highway

College Inn
Newark, Delaware

Eckerd's Suburban Stores
DuPont Highway,
Wilmington Manor
2003 Concord Pike,
Fairfax
Merchandise Mart

Expresso Coffee Shop
1003 Tatnall Street

Gamiel Bros. Delicatessen & Restaurant
13 E. 7th Street

Gin's Coffee Shop
601 N. Lincoln Street

H. L. Green Co., Inc., 5 & 10
610 Market Street

Greenhill Restaurants
2nd & Greenhill Avenue
4001 Market Street
Newport Gap Pike
3 E. 4th Street

Gus' Luncheon
6th and Lincoln Streets

Hearn's Restaurant
2008 Market Street

Holiday Inn
1843 Marsh Road

Hotel DuPont
11th and Market Streets

Hotel Rodney
12th and Market Streets

Howard Johnson's Restaurants
DuPont Highway &
Hare's Corner
4919 Gov. Printz Highway
Concord Pike &
Murphy Road
Dover, Delaware

Hoy's 5 & 10
206 N. Union Street

Hunter's Restaurant
Delaware Trust Building

Kennard's (Basement Lunch Counter)
617 Market Street

S. S. Kresge Stores
611 Market Street
8th and Market Streets

Loump's Diner
3414 Kirkwood Highway

M.&M. Diner
DuPont Highway

Naaman's Teahouse
Philadelphia Pike

Pennsylvania Railroad Station
Front and French Streets

Picciotti's
4th and DuPont Streets

Post Houses
43rd & Market Streets
105 N. Union Street
Newark, Delaware

Powder Mill Restaurants
Kennett Pike

Reynolds Candy Company
703 Market Street

Smith & Strevig Drug Store
Delaware Avenue &
Adams Street

Strawbridge & Clothier
Gov. Printz Blvd. &
Edgemoor Rd.

Sun Ray Drug Stores
208 W. 10th Street
Merchandise Mart

Three Little Bakers
1313 Lancaster Avenue

Taddle House
702 Delaware Avenue

Tourinns, Inc.
DuPont Highway

United Cigar Store
927 Market Street

Wanamaker's
18th & Augustine Cut-off

Whalen's Drug Store
8th and Market Street

Wilmington Dry Goods
4th and Market Streets

F. W. Woolworth Stores
504 Market Street
9th and Market Streets
Merchandise Mart

"Y" Coffee Shop
Walnut Street Branch
10th and Walnut Street

Y.M.C.A. Dining Room
11th and Washington Streets

Y.W.C.A. Coffee Shop
10th and King Streets

[fol. 37a] [File endorsement omitted].

Acknowledgment of Service (omitted in printing).

[fol. 38]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

AFFIDAVIT OF EARL C. JACKSON—Filed February 16, 1959

State of Delaware,
New Castle County, ss.

Be It Remembered that on this 13th day of February, 1959, personally came before me, the subscriber, a Notary Public for the State of Delaware, Earl C. Jackson, who, after being by me duly sworn according to law, did depose and say as follows:

"As a member of a voluntary citizens organization, known as the Committee for Fair Practices, between March 11 and March 28, 1957, with two other members of the organization, I visited, pursuant to a previous ap-

pointment, William Feinberg, then chairman of The Wilmington Parking Authority. At this visit, we discussed with Mr. Feinberg the policy of The Wilmington Parking Authority with respect to non-discriminatory use of the restaurant to be located on the premises of Wilmington Parking Authority at Ninth and Orange Streets, Wilmington, Delaware. We pointed out to Mr. Feinberg our interest in having a policy of non-discrimination observed in this restaurant. At that time, Mr. Feinberg told us that, in view of the fact that the contract of the Parking Authority with Eagle Restaurant had already been signed, it was too late to require that the restaurant serve everyone irrespective of race.

Further, that as a member of said Committee for Fair [fol. 39] Practices, I have been engaged with other members of this organization, in making a canvass and survey of restaurants and other eating places in the City of Wilmington, Delaware, and adjacent northern New Castle County, Delaware, and as a result of my said activity, I am personally aware that the eating places named in the attached list, titled "Schedule A," practice and follow a policy of serving all patrons without discrimination because of race or color."

Earl C. Jackson

Sworn to and Subscribed before me the day and year aforesaid.

Joseph A. Morris, Notary Public.

(Seal)

[fol. 40]

SCHEDULE A TO AFFIDAVIT

EATING ESTABLISHMENTS WHICH SERVE EVERYONE

Compiled by

COMMITTEE FOR FAIR PRACTICES

Airport Restaurant
New Castle, Delaware

Bus Center
Second and French Streets

Cafeteria
DuPont Highway

Chuck Wagon
Kirkwood Highway

College Inn
Newark, Delaware

Eckerd's Suburban Stores
DuPont Highway, Wilmington Manor
2003 Concord Pike, Fairfax
Merchandise Mart

Expresso Coffee Shop
1003 Tataall Street

Gamiel Bros. Delicatessen & Restaurant
13 E. 7th Street

Gin's Coffee Shop
601 N. Lincoln Street

H. L. Green Co., Inc., 5 & 10
610 Market Street

Greenhill Restaurants
2nd & Greenhill Avenue
4001 Market Street
Newport Gap Pike
3 E. 4th Street

Gus' Luncheon
6th and Lincoln Streets

Hearn's Restaurant
2008 Market Street

Holiday Inn
1843 Marsh Road

Hotel DuPont
11th and Market Streets

Hotel Rodney
12th and Market Streets

Howard Johnson's Restaurants
DuPont Highway & Hare's Corner
4919 Gov. Printz Highway
Concord Pike & Murphy Road
Dover, Delaware

Hoy's 5 & 10
206 N. Union Street

Hunter's Restaurant
Delaware Trust Building

Kennard's (Basement Lunch Counter)
617 Market Street

S. S. Kresge Stores
611 Market Street
8th and Market Streets

Loump's Diner
3414 Kirkwood Highway

M.&M. Diner
DuPont Highway

Naaman's Teahouse
Philadelphia Pike

Pennsylvania Railroad Station
Front and French Streets

Picciotti's
4th and DuPont Streets

Post Houses
43rd & Market Streets
105 N. Union Street
Newark, Delaware

Powder Mill Restaurants
Kennett Pike

Reynolds Candy Company
703 Market Street

Smith & Strevig Drug Store
Delaware Avenue &
Adams Street

Strawbridge & Clothier
Gov. Printz Blvd. &
Edgemoor Rd.

Sun Ray Drug Stores
208 W. 10th Street
Merchandise Mart

Three Little Bakers
1313 Lancaster Avenue

Toddle House
702 Delaware Avenue

Tourinns, Inc.
DuPont Highway

United Cigar Store
927 Market Street

Wanamaker's
18th & Augustine Cut-off

Whalen's Drug Store
8th and Market Street

Wilmington Dry Goods
4th and Market Streets

F. W. Woolworth Stores
504 Market Street
9th and Market Streets
Merchandise Mart

"Y" Coffee Shop
Walnut Street Branch
10th and Walnut Street

Y.M.C.A. Dining Room
11th and Washington Streets

Y.W.C.A. Coffee Shop
10th and King Streets

[fol. 40a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 41]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT--
Filed April 13, 1959

The plaintiff moves for summary judgment on the ground that all the pleadings and the admissions and affidavits on file show that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

Louis L. Redding, Attorney for Plaintiff, 923 Market Street, Wilmington, Delaware.

[fol. 41a] [File endorsement omitted]

[fol. 43]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON, Plaintiff,

v.

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware,

and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Defendants.

Louis L. Redding of Wilmington for plaintiff.

Clair John Killoran and David Snellenburg, II of Wilmington for defendant, The Wilmington Parking Authority.

Thomas Herlihy, Jr., of Wilmington for defendant, Eagle Coffee Shoppe, Inc.

OPINION—April 15, 1959

MARVEL, Vice Chancellor: Plaintiff, admittedly a person within the jurisdiction of the State of Delaware and a citizen, brings this class action for a declaratory judgment in the form of injunctive relief against the action of the defendant, Eagle Coffee Shoppe Inc., a purveyor of foodstuffs and beverages, in refusing to serve him at its restaurant. [fol. 44] It is admitted that plaintiff was refused service at such restaurant solely because he is a Negro, and all parties have moved for summary judgment on the basis that there is no material fact in dispute.

The Wilmington Parking Authority, which owns the space in which the Eagle Coffee Shoppe is located, is alleged to be an agency of the State and to have acquiesced in and consented to a discriminatory practice of the restaurant violative of the Fourteenth Amendment to the Constitution of the United States and is therefore joined as a defendant to this class action.

There is no doubt but that the Fourteenth Amendment forbids any state action which denies to any person within its jurisdiction the equal protection of the laws. However, the Parking Authority, while clearly a State agency, disclaims any control over the policies of its tenant, the restaurant. It contends that it has not purported to dictate to the restaurant as to how its business should be run and that the lease granted the Eagle Coffee Shoppe is a strictly business transaction between landlord and tenant, consummated as a corollary to the creation of rental space in the parking facility in question for the express purpose [fol. 45] of defraying in large part the financing and operation of such public facility.

Obviously, the Fourteenth Amendment plays no part in purely private acts of discrimination, its force coming into play when a state or one of its agencies or subdivisions fails to deal equally with any person within its jurisdiction.

In deciding whether or not discrimination violative of the Fourteenth Amendment has occurred, Courts make a de-

termination as to whether or not the property involved in the action is in effect publicly owned, and if there is no clear showing of public ownership, whether or not state control is being exercised over a privately owned facility.

Thus, in Eaton v. Board of Managers (C.A. 4), 261 F2nd, the fact that a hospital established pursuant to public law was succeeded by a privately built hospital operated by its own board, thereby removing the hospital from the category of a publicly owned institution,[1] compelled a holding that Negro doctors did not have a constitutional right to insist that they not be barred from hospital staff status solely because of their race or color. Compare Mitchell v. Boys Club (D.C. Dist. of Columbia), 157 F. Supp. 101, and Kerr v. Enoch Pratt Free Library (C.A. 4), 149 F2nd 212. [fol. 46] On the other hand, when a Negro seeks rights in property owned by a state agency or by a state political sub-division, the device of a lease of such property to a concessionaire will not serve to insulate the public authority from the force and effect of the Fourteenth Amendment. Lawrence v. Hancock (D.C.S.D.W.Va.), 76 Supp. 1009, (a public swimming pool), and there would seem to be no valid basis for distinction when the leasing of space by a public authority is not a patent attempt at subterfuge but a good faith method of furnishing service to the public through a tenancy, Derrington v. Plummer (C.A. 5), 240 F2nd 922, cert. denied, 353 U.S. 924, (a restaurant in a county courthouse), and Nash v. Air Terminal Services, Inc., (D.C.E.D.Va.), 85 F. Supp. 545 (a restaurant in a federally owned airport and so subject to the Fifth Amendment).

Conversely, where there are no public moneys or property involved, discrimination may be constitutionally forbidden because of the existence of governmental control over the operation of a privately owned institution or facility, Commonwealth of Pennsylvania v. Board of City Trusts, 350 U.S. 230.

There is no doubt but that the Parking Authority is a tax exempt agency of the State engaged in furnishing

[1] The only public moneys currently received by the hospital were paid by the County for the care of indigent patients.

[fol. 46] public parking service in a facility, the financing of which is being borne in large part by rentals received from tenants occupying other parts of the building, Wilmington Parking Authority v. Ranken (Sup.Ct.Del.) 105 A2nd 614. Because these rentals constitute a substantial and integral part of the means devised to finance a vital public facility, in my opinion it was incumbent on the Authority to negotiate and enter into leases such as the one here involved on terms which would require the tenant to carry out the Authority's constitutional duty not to deny to Delawareans the equal protection of the laws. To say that the Authority has no statutory power to operate the restaurant itself is to beg the question in view of the direct relation of rental income to the financing of the facility.

The lease here provides that the tenant " . . . shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority,", and despite the Authority's disclaimer of control over the policies and practices of the Eagle Coffee Shoppe, I am satisfied that the Fourteenth Amendment to the Constitution of the United States is applicable to the operation of all aspects of the structure here involved, and that it forbids discrimi-[fol. 48] natory practices in the restaurant in which plaintiff seeks to establish class rights.

Plaintiff is entitled to a declaratory judgment to such effect. In view of this holding it is unnecessary to consider the common law pertaining to innkeepers or defendants' reliance on §1501 of Title 24,Del.C. as a purported modification of such common law rule.

An appropriate order may be submitted denying defendants' motions and granting plaintiff's motion for a declaratory judgment as prayed for in the complaint.

[fol. 49]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON, Plaintiff,

vs.

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Defendants.

ORDER OF VICE CHANCELLOR MARVEL—May 11, 1959

It Is Hereby Ordered as follows:

1. That the Motions for Summary Judgment filed, respectively, by the defendant, The Wilmington Parking Authority, and the defendant, Eagle Coffee Shoppe, Inc., are hereby denied.

2. That plaintiff's Motion for Summary Judgment is hereby granted.

3. That the policy, practice, rules, regulations and usage of the defendants, or either of them, denying, by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro, the right and privilege to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the restaurant operated by the defendant Eagle Coffee Shoppe, Inc., in the parking facility owned by defendant Wilmington Parking Authority and situate on the Southerly side of Ninth Street between Orange and Shipley Streets, in Wilmington, Delaware, are hereby declared in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. The defendants, their officers, agents, members and employees are hereby permanently enjoined from denying,

by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro the right to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the aforementioned restaurant.

[fol. 50] 5. That the court costs of this action be assessed against the defendant.

6. That the effect of this order be stayed pending the taking of an appeal by defendants upon the filing by them of a supersedeas bond in the amount of $1,000.00 (one thousand dollars).

5-11-59

William Marvel, Vice-Chancellor.

Approved as to Form

Clair J. Killoran, Attorney for Wilmington Parking Authority.

....., Attorney for Eagle Coffee Shoppe, Inc.

Louis L. Redding, Attorney for Plaintiff.

[fol. 50a] [File endorsement omitted]

[fol. 51]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 38, 1959

Appeal From Decree of Court of Chancery of the State of Delaware, in and for New Castle County

CA 1029

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Defendants Below, Appellants,

vs.

WILLIAM H. BURTON, Plaintiff Below, Appellee.

NOTICE OF APPEAL—Filed June 29, 1959

To: Louis L. Redding, Esquire, 923 Market Street, Wilmington, Delaware.

Please take notice that The Wilmington Parking Authority, a body corporate and politic of the State of Delaware, and Eagle Coffee Shoppe, Inc., a corporation of the State of Delaware, Defendants Below, Appellants, hereby appeal to the Supreme Court of the State of Delaware from the Final Order or Decree, dated May 11, 1959, of the Court of Chancery of the State of Delaware in and for New Castle County.

Clair J. Killoran, David Snellenburg, 2nd, Attorneys for Defendants, The Wilmington Parking Authority; Thomas Herlihy, Jr., Attorney for Defendant, Eagle Coffee Shoppe, Inc.

[fol. 51a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 53]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No 38, 1959

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Appellants,

vs.

WILLIAM H. BURTON, Appellee.

OPINION—January 11, 1960

Southerland, C.J., Wolcott and Bramhall, JJ., sitting.

Appeal from the Court of Chancery in and for New Castle County.

Clair John Killoran and David Snellenburg, II, (of Killoran & VanBrunt) of Wilmington, attorneys for appellant, Wilmington Parking Authority.

Thomas Herlihy, Jr., of Wilmington, attorney for appellant, Eagle Coffee Shoppe, Inc.

Louis L. Redding, of Wilmington, attorney for appellee, William H. Burton.

[fol. 54] WOLCOTT, J.:

This action seeks a declaratory judgment that Eagle Coffee Shop, Inc. (hereafter Eagle), the lessee of Wilmington Parking Authority (hereafter the Authority) may not operate its restaurant business in the parking structure at Ninth and Shipley Streets, Wilmington, in a racially-discriminatory manner. The action was commenced by the plaintiff, a Negro, who was denied service by Eagle solely because of his race, color and ancestry, which, plaintiff argues, abridged his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

There are no disputed issues of fact. Consequently, all parties below moved for summary judgment. The Vice-Chancellor granted judgment for the plaintiff, holding that the Fourteenth Amendment is applicable to the operation of all aspects of the parking structure, and that it forbids discriminatory practices in the restaurant of the Authority's lessee. The defendants appeal.

The plaintiff's position is that the Authority is performing a public or state function in operating the public parking facility in question and, as an instrumentality of the state, is required to insure that the operation of the public facility shall not be in a racially-segregated manner. Plaintiff further argues that Eagle, as lessee, is the instrumentality of the Authority, admittedly an agency of the state, and that its discriminatory acts are in law the acts of the state and, hence, violative of the Equal Protection Clause [fol. 55] of the Fourteenth Amendment. The court below so ruled.

The Authority's position is that it has not discriminated racially against the plaintiff because it has no legal or *de*

facto control over the operation of Eagle's restaurant. It argues that its sole interest in the Eagle lease is the deriving of rent therefrom in order to defray the expense of operating the parking facility, an otherwise unprofitable operation required, however, to be self-sustaining. Accordingly, the Authority argues that Eagle's refusal to serve the plaintiff was private and not state action subject to the interdict of the Fourteenth Amendment.

Eagle joins in the position taken by the Authority and, in addition, relies on 24 *Del.C.*, §1501 which provides that no restaurant shall by law be obligated to give service to persons if such service would be offensive to the major part of its customers to the injury of its business. This statute, Eagle argues, is a codification of the common law relating to the duties of restaurant keepers.

Since the decision of the Supreme Court of the United States in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, the states and their instrumentalities have been required to act within the scope of state action in a racially non-segregated manner. If, therefore, Eagle is, as plaintiff contends, the ultimate instrumentality of the state performing a state function, the Fourteenth Amendment requires it to serve the plaintiff and all others with his racial background.

[fol. 56] The ultimate question for our determination, therefore, is whether or not, under the decisions cited to us, the Eagle restaurant business is cast with such public character as to make it in law a state function, carried on under the auspices and with the support of the public authority. We turn to the authorities cited to us for the answer.

Nash v. *Air Terminal Services, Inc., et al.*, 85 F.Supp. 545, was a case decided under the now discarded doctrine of separate but equal facilities for Negroes. The case, however, seems pertinent not only because of its factual resemblance to the case at bar but, also, as an enunciation of a test for determining when certain actions may or may not be attributed to the public government.

In the *Nash* case the plaintiff, a Negro using the facilities of the Washington National Airport for air transportation,

sought and was refused service in a restaurant operated in the terminal building. The restaurant in question was operated on a concession from the public government in a building constructed entirely with public money and operated for the serving of persons using an airport constructed entirely with public money. Under these facts it was held that the plaintiff had been denied his rights since, at the time, there were no separate but equal facilities offered for Negro patrons of the airport. *A fortiori*, if the failure to supply separate but equal facilities at a time when that doctrine was part of our constitutional law [fol. 57] was a deprivation of the rights of the plaintiff, once that doctrine is struck down the plaintiff's rights would be denied by the refusal of any service.

Derrington v. *Plummer*, 240 F.2d 922, dealt with the refusal of service to a Negro in a cafeteria installed and operated in the basement of a county courthouse. The facts were that some time in 1953 the county contemplated the erection of a new courthouse. In the plans of the building a portion of the basement was set aside and reserved for a cafeteria to be operated primarily for the benefit of persons having business in the courthouse. The courthouse, including the cafeteria facilities, was completed entirely with public funds. Thereafter, the cafeteria was operated by a private lessee. The cafeteria served persons having business in the courthouse and public employees, and, also, was open to the public. The plaintiff, a Negro, sought service and was refused because of his race.

It was held that the lessee was subject to the prohibitions of the Fourteenth Amendment as the agent of the state. The rationale of the decision is that the courthouse having been built with public funds for the use of the public, the original plans having provided for the inclusion of a cafeteria for the use of the public, and the cafeteria, itself, having been equipped and furnished by the county, the state could not avoid the constitutional requirement of nondiscrimination by leasing to a private business.

[fol. 58] *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N.E.2d 82, was a case in which the plaintiffs, Negro citizens of Ohio, sought the right to use and enjoy a municipal

swimming pool, built at public expense. It appeared that when completed the swimming pool had first been opened on a non-discriminatory racial basis but that, from that, trouble and disorder had ensued. The city ceased to operate the swimming pool and leased it to a veterans organization at an annual rental of 10% of the gate receipts; the city, however, paying all maintenance costs. The veterans organization, the lessee, operated the pool in a racially-discriminatory manner.

It was held that the lease to the veterans organization was a subterfuge adopted by the city to avoid the requirements of the Fourteenth Amendment. The court was of the opinion that, under the circumstances, the veterans organization was an instrumentality of the city which, in turn, of course, was an instrumentality of the State of Ohio and, thus, was subject to the provisions of the Fourteenth Amendment.

Substantially to the same effect is the case of *Kern* v. *City Com'rs of City of Newton, et al.*, 151 Kan. 565, 100 P.2d 709.

Muir v. *Louisville Park Theatrical Assn.*, 347 U.S. 971, 74 S.Ct. 783, was a case in which the City of Louisville had erected in one of its public parks an amphitheater, owned and maintained by the city. It appeared that the amphitheater was an appropriate adjunct of the city's park maintained for all the people. The city leased the structure [fol. 59] to a theatrical association which, under the terms of its lease, had the right to charge admission fees and to sell refreshments. The plaintiff, a Negro, was denied admittance to a performance in the amphitheater given by the theatrical association.

The District Court held, and was affirmed on appeal to the Court of Appeals, that the city was guilty of no racial discrimination because there was no evidence that any comparable Negro theatrical association had applied to the city for use of the amphitheater. On petition for certiorari to the Supreme Court of the United States the judgment in the *Muir* case was reversed and the case remanded for consideration in the light of *Brown* v. *Board of Education*, supra.

The reason for the reversal is not set forth in full, but it seems apparent that the Supreme Court had in mind the circumstances that the city had built and maintained from public funds an amphitheater for public use and, under the circumstances, any lessee operated it as an instrumentality of the city.

Pennsylvania v. *Directors of City Trusts*, 350 U.S. 230, 77 S.Ct. 1281, was a *per curiam* opinion holding that the trustees under the will of Stephen Girard, appointed by the City of Philadelphia, could not perform their duties under the trust created for the education of "white male orphans" in a manner to discriminate against Negro male orphans. Plaintiff points out that Stephen Girard, by his [fol. 60] will, had created a trust out of his private fortune but that, nevertheless, the principles of the Fourteenth Amendment were held to apply to the operation of the trust by the trustees. The element of public control, apparently, was that the trustees of the Girard Trust were publicly appointed trustees in complete control of the operation of a privately endowed trust.

We think a careful consideration of the foregoing cited authorities leads necessarily to the conclusion that the provisions of the Fourteenth Amendment relating to equal protection of the laws apply to the operation of any facility or any other thing created at public expense or operated by public authority.

In the *Nash* case, for example, the air terminal at the Washington National Airport had been erected solely with public funds and the restaurant involved had been contemplated initially as a service to persons using the National Airport. Furthermore, it is not clear that the public government did not exercise ultimate control over operation of the restaurant since it was operated as a concession of the public government.

Similarly, the *Derrington* case involved a facility constructed entirely with public funds which contained, from the planning stage onward, a cafeteria intended for the use of the public. The cafeteria, itself, was constructed and equipped by public money and was operated primarily for the benefit of the persons using the courthouse. Con-

[fol. 61] sequently, while technically there may have been no direct control over the lessee who operated the cafeteria, the lessee was nevertheless operating a facility erected entirely by the public treasury for the purpose of serving the public.

The *Culver* and *Kern* cases were cases also of publicly paid for facilities. These cases also contain the additional circumstance of an attempt by subterfuge to avoid the prohibitions of the Fourteenth Amendment. The *Muir* case similarly is a case of the erection and maintenance entirely with public funds of an appropriate adjunct of a public park.

The *Girard College* case apparently falls within the scope of the Fourteenth Amendment solely by reason of the fact that the trustees administering the trust created by Stephen Girard were publicly appointed. It is interesting to note that since the *per curiam* decision of the Supreme Court of the United States, the State of Pennsylvania has abrogated the right of the City of Philadelphia to appoint the trustees administering the Girard Trust, thus, presumably, eliminating the requirement that such trust be administered in a racially non-discriminatory manner. Cf. *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, cert. den. 357 U.S. 570.

It thus seems apparent to us from the cited authorities that the Fourteenth Amendment is applicable to the operation of a facility, either public or quasi-public in nature, if either the facility has been erected and is maintained with public money, or if the operation of such a facility [fol. 62] is conducted under public auspices or control.

We turn now to the particular facts of the case at bar. Initially, we should observe that the plaintiff in the case at bar has not been discriminated against by the Authority in the operation of the public parking portion of the facility since the record discloses that at the time this incident occurred the plaintiff had parked his car in the public parking portion and, thereafter, proceeded to the Eagle restaurant where he was denied service.

The facts surrounding this controversy and the physical aspect of the Authority's facility do not appear in much

detail in the record before us. However, we think we are at liberty to take notice of certain physical facts concerning the matter which appear from a casual inspection of the facility itself. We note, therefore, that the space in the Authority's structure leased by Eagle, while located within the exterior walls of the structure, has no marked public entrance leading from the parking portion of the facility into the restaurant proper. The main and marked public entrance to Eagle's restaurant is located on Ninth Street. It appears from the record before us, furthermore, that Eagle at its own expense installed the major portion of the furnishings of its restaurant and all of the necessary fixtures to make the leased space suitable for the operation of its business. The Authority installed a bare minimum in the space ultimately leased to Eagle.

[fol. 63] The lease between the Authority and Eagle contains a covenant binding Eagle to "occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority." Plaintiff refers to this covenant but we think the covenant does not have much bearing on the basic question presented to us. We have for decision the broad question of whether or not the maintenance of the facility by the Authority, admittedly a state instrumentality, is in all its ramifications and details, including the leasing to private business, state action falling within the scope of the protective provisions of the Fourteenth Amendment. The referred to covenant is applicable to this case only if the answer to the broad question is in the affirmative since only under such circumstances would the Fourteenth Amendment be applicable to Eagle's business.

The question is to be decided in the light of the circumstances surrounding this entire matter. The nature of the enterprise conducted by the Authority is of primary importance to our decision. Unfortunately, the record before us is not as complete as we would have desired. We think, however, that we may take notice of the facts embodied in the opinion in *Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 439, 105 A.2d 614, on which plaintiff relies. In that case we upheld against attack the constitutionality of the Parking Authority Act of 1951 (22 *Del. C.*, Ch. 5) and

the legality of the proposed acts of the Authority pursuant to it.

[fol. 64] In the *Ranken* case we had before us certain determinations made by the Authority in planning the erection of the facility in question. Thus, the Authority determined that in order to erect and operate the structure as a self-sustaining unit as required by the General Assembly, it would be necessary to obtain additional revenue from commercial leasing of space, and to utilize the space of the final structure upon the following ratio: 61% for parking; 39% for private leases. We assume that the structure as actually completed maintains this ratio. The Authority made a further determination that the cost of construction, including the cost of land, would be divided upon the following ratio: 38.4% to parking space; 61.6% to the leased area. We assume that this estimate of division of cost is the fact. Finally, the Authority determined that its revenue derived from the operation of the facility would come from these sources upon the following ratio: 30.5% from parking; 69.5% from private leases. We assume this division to be the fact.

From the *Ranken* case it appears that the only public money used in the construction of the facility was the sum of $934,000 "advanced" by the City of Wilmington and used in the purchase of a portion of the land required. It did not appear in the *Ranken* case, and does not appear in the case now before us, what the terms and conditions of this "advance" by the city were.

We have not been furnished with the actual cost figures of the construction of the facility but since, in the *Ranken* [fol. 65] case, the cost of construction of a parking facility alone was estimated to be approximately $3,800,000, and since the estimated cost allocated to parking space of a combined facility was 38.4%, we assume that the total cost of the presently existing facility was in the neighborhood of $6,100,000. It does appear as a fact, however, that the actual cost of construction was paid from the proceeds of the sale of revenue bonds issued by the Authority and, accordingly, upon the determined ratios, the public money "advanced" for the project amounts to approximately 15% of the total cost of the facility as finally erected.

From the *Ranken* case, also, it appears that the revenue from parking alone was predicted to be $150,000 annually which was estimated to amount to 30.5% of the total expected revenue of the combined facility. Accordingly, the facility's total revenue we assume to be approximately $342,000 annually, of which approximately $212,000 is derived from the rentals to commercial enterprises.

In the *Ranken* case we considered a constitutional attack upon the Authority's proposal on the basis that it had no authority to enter into private leases solely for the purpose of obtaining revenue to support the operation of the public part of the facility, viz., the furnishing of off-street parking. We held, however, that the authority to lease to private business was valid. We held that the furnishing of off-street parking was a proper public purpose and met an existing need supported by a legislative finding to that effect [fol. 66] and, since it was the fact that the proper public purpose could not be supplied as a self-supporting unit without additional revenue to be supplied by commercial leases, we held that the entering into such private leases did not destroy the public-use character of the facility.

We recognized in the *Ranken* case that the proposed leases to private businesses were wholly unrelated to the public purpose to be subserved by the parking facility, except as a source of additional revenue to permit the financing and operation of the parking facility. We were of the opinion that the supplying of off-street parking services occupying 61% of the total space of the structure, despite the leasing of the balance of the space to private business, was and remained the paramount or primary use of the structure. We held, therefore, that the leasing to private business, while necessary financially to the project, was nevertheless a subordinate or incidental use of public property. We, accordingly, upheld the constitutionality of the grant of power to lease which, in the absence of such circumstances would have been an unconstitutional use of public property.

We summed up our holding in the *Ranken* case in the following language:

> "Since the dominant or underlying purpose of the contemplated project subserves a public use, commer-

cial leasing of space therein for uses unrelated to the public use is permitted to the extent, and only to the extent, that such leasing is necessary and feasible to enable the Authority to finance the project."

[fol. 67] We think it apparent, therefore, that the only connection Eagle has with the public facility operated by the Authority is the furnishing of the sum of $28,700 annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise.

We think the case before us is distinguishable from the cases relied on by the plaintiff. In the first place, it is quite apparent, nor is there any suggestion to the contrary made by the plaintiff, that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility. As far as the record before us indicates, it was immaterial to the Authority what type of business would occupy the space now occupied by Eagle. The Authority's sole interest was in the obtaining of money in the form of rent. That money is thereafter used by the Authority to support the public purpose of supplying off-street parking from which the plaintiff and the rest of the public benefit.

It is further clear from this record, and from the *Ranken* case, that at no time did the Authority contemplate the establishment of a restaurant in the structure for the use of its parking patrons. On the contrary, the commercial leases entered into by the Authority were given to the highest bidders in terms of rent after the solicitation of bids by public advertisement. The decision to lease to a particular lessee was made upon the considerations of the [fol. 68] applicants' financial responsibility and the amount of rent agreed to be paid. It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking.

The plaintiff argues that the use of public money to purchase a portion of the land required brings this case within the rule of the cited authorities. But we think not. At the most, approximately 15% of the total cost is represented by the public "advance" of money. To accept the plaintiff's view would require us in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise. It is obvious that there is no guide for judicial speculation upon such a matter. If it is said that the contribution of any public money is sufficient to change the nature of the enterprise, the answer is that it has been held that a slight contribution is insufficient. Cf. *Eaton* v. *Board of Managers*, 164 F. Supp. 191.

Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; [fol. 69] if it is not the case, the operators of the enterprise are free to discriminate as they will. *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 842. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy.

Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern

the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the [fol. 70] State of Delaware.

It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in 24 *Del. C.*, §1501 with respect to restaurant keepers. 10 *Am. Jur., Civil Rights*, §§21, 22; 52 *Am. Jur., Theatres*, §9; *Williams* v. *Howard Johnson's Restaurant*, 268 F.2d 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment.

Finally, plaintiff contends that 24 *Del. C.*, §1501, has no application in the case at bar because Eagle, since it serves alcoholic beverages to its patrons, is a tavern or inn and not a restaurant. It is argued that, at common law, an inn or tavern could deny service to no one asking for it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 *Del. C.*, §1501, which does not compel the operator of a restaurant to give service to all persons seeking such.

For the foregoing reasons, the judgment of the court below is reversed.

[fol. 72]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 38, 1959

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Appellants,

vs.

WILLIAM H. BURTON, Appellee.

PETITION FOR RE-ARGUMENT—Filed January 28, 1960

Plaintiff petitions the Court for re-argument of its decision, on the following grounds:

1. The Court Misconstrued Plaintiff's Position

The Court takes the view (Opinion, p. 16) that plaintiff based argument that his exclusion on the ground of race from the restaurant in the Parking Authority's structure offends the Fourteenth Amendment on the fact that public money was used to purchase part of the site and the Court then concluded that only "approximately 15% of the total cost of the structure is represented by the public 'advance' of money." Construing plaintiff's position thus, the Court rejects it as requiring the Court "in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise."

[fol. 73] However, nowhere has plaintiff taken, nor is his case founded upon, the position the opinion ascribes to him. Instead, briefly summarized, plaintiff's position is the following: that the Parking Authority is an agency of the State; that all of its activity in planning the structure, acquiring the site and erecting and operating the facility is performed as a state, or public, function and through the employment of powers vested in the Authority as a State agency; that all of the funds coming to the Parking Au-

thority, whether advances or donations from the City of Wilmington, proceeds from the sale of revenue bonds, parking fees or rent from tenants, are public funds essential to the creation and maintenance of the structure as a governmental unit; that all physical parts of this unit are property of this State agency, and in the maintenance and operation of the same, the Parking Authority and the restaurateur, who became the Authority's tenant with notice of the public character of the Authority and its structure, are bound by the constitutional inhibitions against racial discrimination.

2. The Court's Opinion Is Founded Upon an Incorrect Assumption of Facts Outside the Record

In concluding that "At the most approximately 15% of the total cost of the structure is represented by the public [fol. 74] 'advance' of money," the Court relied upon an incorrect assumption of facts outside the record of this case, namely, that the cost of construction alone was approximately $3,800,000. (Opinion, p. 13) As shown by "Exhibit A" hereto attached, the cost of construction was $1,288,000.

3. Irreconcilability With Wilmington Parking Authority v. Ranken

In declining to forbid racial discrimination in the governmental structure, the Court's opinion creates an irreconcilable conflict with the rationale of the *Ranken* case in which this Court sustained commercial leasing of "public property" only as incidental to the *public* use; recognized, in sustaining commercial leasing of part of the governmental structure, "that the recent years have seen a very great expansion of governmental activity in fields formerly believed to be reserved for private enterprise," and held "the purpose of the project as a whole to be a public one . . . ."

4. Conflict With Recent Decisions

The Court's opinion conflicts in principle with the only two decisions in this field intervening after submission of this case, rendered just prior to the filing of the opinion,

namely, *Coke* v. *City of Atlanta*, et al., C.A. 6733, U.S. D. Ct., N.D. Ga., Atlanta Division, decided January 6, 1960, and *Jones et al.* v. *Marva Theatres, Inc., and the City of Frederick*, C.A. 10704, U.S. D. Ct., D. Md., decided January 5, 1960, copies of which decisions are appended hereto.

[fol. 75] CERTIFICATE

The foregoing petition for re-argument is believed to be meritorious and presented in good faith and not for delay.

Louis L. Redding, Attorney for Petitioner.

[fol. 77]

EXHIBIT A(1)

(See Opposite)☞

[fol. 79]

(Stamp)

FILED IN CLERK'S OFFICE
JAN 8—1960
C. B. Meadows, Clerk
By R. M. S.
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 6733
Civil Action

H. D. COKE

v.

CITY OF ATLANTA, a Municipal Corporation of the State of Georgia and County of Fulton; WILLIAM B. HARTSFIELD, Mayor of said City of Atlanta; JACK GRAY, Terminal Manager of the Atlanta Airport Terminal; DOBBS HOUSES, INC., a Corporation organized and existing under the laws of the State of Tennessee; B. E. BUTTREY, Manager of Dobbs Houses, Inc., Restaurant at the Atlanta Airport Terminal.

ATTACHMENT TO PETITION FOR REARGUMENT

Plaintiff, a Negro man, a citizen and resident of the State of Alabama and City of Birmingham, on behalf of himself and others similarly situated, brings this complaint seeking injunctive relief. The defendants are the City of Atlanta, its Mayor, its Airport Manager, Dobbs Houses, Inc., and the Manager of the Dobbs Houses, Inc., Atlanta Airport Restaurant.

Briefly, plaintiff alleges that while an interstate passenger from Birmingham, Alabama to Columbus, Ohio, he had to change planes in Atlanta; that his connecting plane was late and that Delta Air Lines issued to him and other passengers Meal Authorization Tickets directed to Dobbs

Houses, Inc. and directed plaintiff and his party to secure their meal at the restaurant of Dobbs Houses, Inc., in the Atlanta Airport Terminal.

Plaintiff contends that he and other passengers entered the Dobbs Houses Restaurant and that plaintiff was refused service at a table of his choice and that the hostess directed him to a single corner table which was segregated behind a screen for the purpose of serving Negroes and refused to serve plaintiff on the same basis as white passengers.

Plaintiff contends that the Dobbs Houses, Inc. restaurant [fol. 80] in the Atlanta Airport Terminal is located on property belonging to the City of Atlanta and that the restaurant is subject to the supervision and control of the city and its agents. Plaintiff contends that the refusal to serve him on the same basis as white passengers was a denial of plaintiff's rights guaranteed by the equal protection clause of the Fourteenth Amendment to the United States Constitution and that the same constitutes a burden on interstate commerce which is forbidden by Article I, Section 8 of the United States Constitution.

Plaintiff seeks an injunction restraining defendants from making any distinction based upon color in regard to services at the Atlanta Airport Terminal or the restaurant therein.

It is the contention of the City of Atlanta, its Mayor and Airport Manager that the space in the Airport Terminal which is occupied by Dobbs Houses, Inc. for its restaurant is leased to Dobbs Houses, Inc. and that the lease does not give the City the right to control the operation of the restaurant and that it has at no time controlled or sought to control the operation of the restaurant.

It is the contention of Dobbs Houses, Inc. that it is a private corporation and that it simply leases the space in which the restaurant is located and that the City of Atlanta does not have the right to control nor has it attempted to control the operation of the restaurant.

Dobbs Houses, Inc. contends that it employed its manager, Mr. Buttrey, and that the segregation, if it amounts to segregation in the dining room, is the result of its manager's own discretion without direction or control from the corporation or from the City of Atlanta and was dictated by his judgment that it was good business to maintain

Contract for Parking Unit Given $1,288,000 Bidder

A long stride toward realization of the multi-level parking building at Ninth and Shipley Streets was taken yesterday afternoon when the Wilmington Parking Authority awarded the construction contract for the facility to McCloskey and Company of Philadelphia.

The contract total, including additional elevator and excavation, stands at $1,288,000.

The McCloskey Company entered the [illegible] bid of $1,243,000 on Oct. 4 during a meeting in the offices of the architect. Five other firms also participated in the bidding, three of them from Wilmington.

With all five members of the authority attending yesterday's meeting, possibly the most important ever held by the parking agency, it was voted to also accept the supplemental bid by McCloskey for a second elevator at $23,000 and the supplemental excavation bid at $22,000.

Under terms of the contract, which will be signed at a later date by officers of the authority and representatives of the construction firm, work on the building will begin after Jan. 1 of next year and not later than Jan. 13.

The initial work will be concentrated on completion of the parking portion of the structure with less immediate emphasis on the [illegible] area.

William [illegible], chairman of the authority, has estimated that the building will be ready for use by the end of September or beginning of October to plenty of time to handle the Christmas shopping through next year.

Work is not getting under way immediately because authority determined some time ago to cooperate with downtown merchants who felt the loss of the parking lot prior to the Christmas season would threaten business.

The additional excavation under the commercial area, which faces Ninth Street, will provide approximately three feet of additional head-room in the basement which will allow tenants to use the area for either storage or sales.

Barney Cantor, vice chairman of the authority, made the motion to accept the McCloskey bid along with the supplemental bids for the elevator and excavation. The motion was seconded by Hubert S. Stees, authority secretary and unanimously approved with, in addition to Mr. Cantor and Mr. Stees, Mr. Feinberg, J. Sellers Bancroft and Jay C. Downs [illegible] voting in assent.

William Sabia represented the successful bidder during the meeting. Clair J. Killoran, authority counsel, was on hand along with G. Morris Whiteside and William Moeckel for the architects, Whiteside, Moeckel and Carbonell, who are handling this phase of the work for the authority. Edwin F. Koester, former authority chairman, also attended the meeting, which was held in the Street and Sewer Department board room in the Public Building.

In other business, the authority members abandoned a proposal to raise the all-day parking rates at the present Ninth and Shipley Streets lot. The decision came after a survey of parking statistics on the lot indicated that only 14.75 per cent of parkers in a four-month period stayed on the lot all day.

The study was based on parking lot activity during November and December of 1958 and March and September of this year. During the period approximately 65,000 automobiles were parked on the lot. The survey also showed 18.5 per cent of the total number of parkers stayed less than one hour, 19.75 per cent [illegible] than two hours and [illegible] per cent stayed [illegible] three hours. The combination of these figures showed that 67 per cent of the total number of cars parked on the lot stayed less than three hours.

On the basis of these figures, the authority members, who sought to increase turn-over and discourage the all-day parker, scrapped the plan.

Mr. Bancroft, authority treasurer, reported that parking receipts at the lot for the month of September were $7,037.70. After operating expenses, wages, and management fees a total of $3,187.47 was deposited to the authority's account, Mr. Bancroft said.

After the reading of a letter,

use the area for either storage or sales

Early plans had included an electric snow removal system for the two circular ramps that will feed automobiles to the parking decks and roof, but the authority scrapped the proposal yesterday on the "recommendation of our architects and the Delaware Power and Light Company." The McCloskey bid for the electric units had been $9,000.

The competing firms and their base bids follow: McCloskey, $1,243,000; Beteo Construction Company, of Philadelphia, $1,281,600; Turner Construction Company of Philadelphia, $1,[illegible]; the Wilmington firms: [illegible] Johnson and Sons, $1,340,000; Healy and Sons, $1,485,000, and the Bader Company, $1,536,000.

The complete proposals have been on display at the Allied Construction Industries offices, 600 block Shipley Street, to allow firms to examine the bids of their competitors for possible [illegible]

circuit sale.

After the reading of a letter from the Emmett S. Heckman Company, local realtors, the authority members agreed to meet in the "near future" with members of the firm to consider terms for leasing the several-store commercial area to be included in the parking structure.

Finally, the authority heard a request from the Retail Merchants Section of the Delaware State Chamber of Commerce for a $474.85 subscription as the agency's share in the cost of arranging for installation of electrical street decorations in the central business district.

A motion was approved to inform the chamber by letter that the authority is without funds for projects of this nature.

Mr. Feinberg directed that the letter inform the chamber that "by this time next year we hope to have tenants in the new Ninth Street stores who will fulfill this obligation."

BIDS ON PARKING PROJECT ASKED

The Wilmington Parking Authority yesterday advertised for bids on construction of its proposed four-level parking building at Ninth and Shipley Streets.

The deadline for bids to be delivered to the office of Whiteside, Moorkel, and Carbonell, architects, is Thursday, Oct. 4. The Parking Authority has said previously that construction should begin in the first two weeks of January.

There will be four levels of varied size for parking including Shipley Street, Orange Street, mezzanine, and roof levels. The three lower levels will start at the back of the commercial section which will face Ninth Street. The entire roof, including the area over the commercial section of the structure, will be used for parking. Total capacity will be 500 cars.

In other business, the authority yesterday decided to send a representative to a parking problem workshop in Detroit, Mich., on Monday and Tuesday, Oct. 22 and 23.

At an afternoon meeting Hobert Steen, a member of the authority, agreed to attend the meeting, which will include discussion of parking in secondary shopping centers, parking problems in mid-city areas, how such problems have been solved in other cities, and summations of the general solutions to the problem.

The Authority also received a monthly report from Ninth Street Parking, Inc., showing net receipts of $3,397.31.

Peninsula Deaths

John-Ed Clifton

LEWES, Sept. 10—(Special)—John-Ed Clifton, 78, a native of Long Neck, Sussex County, died last night at the home of his daughter, Mrs. Lee Rust, on the Millsboro Road.

McCloskey & Co. Figure on Structure $457,000 Under Official Ceiling

Six construction companies entered bids yesterday to erect the Wilmington Parking Authority's multi-level facility at Ninth and Shipley Streets with the three lowest bidders separated by only $37,700.

The McCloskey & Company construction firm of Philadelphia submitted the lowest bid at $1,243,000 with two other companies from that city close behind.

The Baton Construction Corporation, second lowest bidder, trailed the McCloskey estimate by only $18,400 with a total bid of $1,261,400. Third of the Philadelphia companies, the Turner Construction Company, submitted a bid of $1,273,700.

Three Local Firms Bid

Local companies represented included DiSabatino & Sons, John E. Healy & Sons and J. A. Bader Company.

The DiSabatino bid at $1,349,000 was the lowest of the local entries, with Healy next at $1,[illegible],000 and the Bader bid the highest at $1,330,695.

William Feinberg, chairman of the authority, opened the bids in the offices of Whiteside, Moorkel and Carbonell at 909 Tatnall Street, architects for the project, where numerous construction officials, bankers and company representatives had gathered.

Mr. Feinberg announced that copies of the bids would be sent to Allied Construction Industries, 421 Orange Street, where bidders will be allowed to inspect estimates submitted by their competitors. The estimates will remain available to the six firms for a total of five days. Following this legal time period, should there be no discrepancies or disagreements, the authority will be in a position to award the construction contract.

"We are very pleased with the bids," said Mr. Feinberg, "in fact, we are more than pleased."

Extra Funds Available

The [illegible]

Extra Funds Available

The construction ceiling bid for the facility obtained by the authority in April was $1,700,000 and the subsequent bond issue was based on that figure. This means the authority will possibly have some extra money on hand with which to pay off the bonds after construction is completed.

All of the bidders submitted estimates for additional specifications as requested by the authority.

In the order listed, the prices are for an additional elevator.

See PARKING—Page 25, Col. 1

[fol. 81] separate seating for white and Negro patrons and that the failure to maintain separate seating would cause in that restaurant a loss of patronage and decreased revenue.

Findings of Fact

1. Plaintiff, a Negro man, was and is a citizen and resident of the State of Alabama and the City of Birmingham, and is a vice-president and agency officer of the Protective Industrial Insurance Company of Alabama. This company operates and has agents only in the State of Alabama. Plaintiff's business requires some travel and he has occasion to pass through the Atlanta Airport from one to four times a year.

2. On August 4, 1958, plaintiff was enroute from Birmingham, Alabama, to Columbus, Ohio, to attend an insurance convention.

Upon arrival in Atlanta at the airport terminal, plaintiff went to the office of Delta Air Lines to arrange for a change over from Eastern Air Lines to Delta Air Lines. At that time, plaintiff was informed by an agent of Delta that his plane would be late and that he would not be able to get a meal on the plane and the Delta agent gave to plaintiff a meal ticket and directed him to carry the meal ticket to the Dobbs Houses restaurant in the airport terminal for the purpose of being served a meal.

Plaintiff accompanied by two companions entered the Dobbs Houses restaurant and selected a table near the center of the restaurant and as they were about to seat themselves, the hostess approached and told them not to take seats at the table they had chosen, that they would have to be seated at a "table reserved for your people." This table was in one corner of the restaurant and was separated from the other tables by a screen. Plaintiff then asked the hostess why they must sit at the table behind the screen and the hostess replied that she had been "in-
[fol. 82] structed by the management." Plaintiff then asked for the manager and was told that he was not there.

Plaintiff and his companions refused to sit at the table designated by the hostess, whereupon the hostess told them

they could be served at a cafeteria located outside the terminal building, but nearby, which the hostess pointed out to plaintiff and his companions. The hostess informed plaintiff that the same food served in the restaurant would be served in the cafeteria but the prices in the cafeteria would be cheaper. Plaintiff and his companions refused to go to the cafeteria for service there and returned to the office of Delta Air Lines where plaintiff reported to the agent that he had been refused service at the Dobbs Houses restaurant. The Delta agent looked at plaintiff's meal ticket, told him there had been a mistake in that the authorized meal should have been $1.75 rather than $1.50 and made this change on the meal ticket and instructed plaintiff to return to the Dobbs Houses restaurant and assured plaintiff that he could obtain his meal there. Plaintiff and his companions then returned to the Dobbs Houses and were about to enter when the headwaiter met them and advised them not to enter the restaurant unless they were willing to sit at the table reserved for Negroes behind the screen, whereupon plaintiff and his companions did not again enter the Dobbs Houses restaurant.

3. There is constant use of the Atlanta Airport Terminal facilities by Negroes. The Henderson Travel Service, located in the City of Atlanta, has a clientele, the major portion of which are Negroes and in an eleven month period from January 1, 1959 to November 30, 1959, sold airplane tickets amounting to $82,683.85 which figure does not include sales purchased by the use of credit cards. The major portion of these tickets were purchased by Negroes for interstate travel. A spot survey of the Atlanta Municipal Airport between November 20, 1959 and December 1, 1959, [fol. 83] showed the following count of Negro persons that were seen utilizing the facilities of the Atlanta Airport Terminal:

November 20, 1959—1:30 to 4:30 P. M., 19.
November 23, 1959—3:30 to 5:30 P. M., 13.
November 30, 1959—6:30 A.M., to 10:30 A. M., 22.

4. The restaurant of Dobbs Houses, Inc. located in the airport terminal in Atlanta is open to the public generally

and any one who wishes to do so may patronize the restaurant but Mr. Buttrey, as manager of the Dobbs Houses, Inc. restaurant, determined that, for business reasons, segregation of the races would be maintained in the Dobbs Houses restaurant. This policy of segregation was that if the Negroes wanted to eat in the restaurant they would be seated at a table or tables reserved for Negroes which were separated from the other tables in the restaurant by a screen.

5. Dobbs Houses, Inc., nor its manager, at no time received any instructions or directions from the City of Atlanta; Mr. Gray, the manager of the airport; or any one else connected with the city, on the subject of segregation of Negroes within the restaurant. The decision to segregate Negroes from white customers within the restaurant was solely the decision of the management of Dobbs Houses, Inc. It was the opinion of the manager that such segregation was for the best business interest of his company and would actually be for the protection of Negroes in that it might save them embarrassment. The City of Atlanta has nothing to do with this decision and has never undertaken to exercise any control over the restaurant of Dobbs Houses, Inc.

6. The City of Atlanta owns the municipal airport. The City of Atlanta, through a manager and other employees, operates the airport and the terminal building. It leases space in the terminal building from which it received a revenue of $523,599.30 for the year 1958.

[fol. 84] 7. The terms under which Dobbs Houses, Inc. occupies space in the Atlanta Airport Terminal are defined by a lease from the City of Atlanta to Dobbs Houses, Inc., referred to in plaintiff's complaint appearing in evidence as Plaintiff's Exhibits 1 and 2.

The lease describes the space leased to Dobbs Houses, Inc. for the restaurant concession as being " . . . certain space on the first floor of the new passenger terminal building located on the above described municipal airport, marked 'restaurant concession' on 'Exhibit A' attached hereto and made a part hereof."

This lease provides, inter alia, that Dobbs Houses, Inc. shall pay a minimum rental of $1500.00 per month plus 6% of gross sales where such percentage exceeds the sum of $1500.00 per month. The average monthly rentals coming from Dobbs Houses, Inc. to the City of Atlanta from January 1, 1959 to July 1, 1959, was $17,805.60. The lease does not reserve to the city the right to control the operation of the restaurant, nor has the city, in fact, controlled or undertook to control the operation of the restaurant. The lease does provide that Dobbs Houses, Inc. shall render prompt service to the patrons of the airport. The only right to control reserved by the lease contract as to the manner and method of operating any of the concessions leased to Dobbs Houses, Inc. is contained in Article H(2) providing that "Dobbs shall submit to the manager of the airport, if requested, a schedule of articles and commodities proposed to be offered for sale at the tobacco and newsstands and the gift shop, and the prices proposed to be charged therefor and only articles or commodities having the approval of the manager of the airport shall be sold or offered for sale." This provision applies only to the newsstand and gift shop and does not apply to the restaurant. In addition to the space for the restaurant, Dobbs Houses, Inc. also leases space wherein it conducts a snack bar, a [fol. 85] newsstand and a gift shop. The lease imposes various requirements upon the lessee, but nowhere does it give the city the right to control the operation of the restaurant.

The right of the city in the event of default is to cancel the lease.

Conclusions of Law

1. This Court has jurisdiction of this cause by virtue of the provisions of Title 28, U. S. C., § 1343 and Title 42, U. S. C., § 1983.

2. This Court is bound by the decisions of the Supreme Court of the United States and by the decisions of the United States Court of Appeals for the Fifth Circuit.

3. When a provision of the Constitution or a law has been construed or declared by either the Supreme Court of

the United States Court of Appeals for this circuit, this Court is not thereafter free to construe or declare such provisions of the Constitution or law differently even though this Court should believe it should be differently construed or declared, but is bound by the decisions of such courts.

4. The complaint states a proper case for class action. The suit is one for interference with plaintiff's alleged rights as a Negro citizen and he may properly sue on behalf of all other Negro citizens since they all have an identity of interest in having access to the restaurant on a non-segregated basis. Evers v. Dwyer, 358 U. S. 202; Sharp v. Lucky, 5 Cir., 252 F. 2d 910, 913; Derrington v. Plummer, 5 Cir., 240 F. 2d 922.

5. The decisive question presented here is:

Whether the action of the lessee, Dobbs Houses, Inc., may fairly be said to be the conduct of the City of Atlanta and thus state action.

[fol. 86] 6. If this question is answered in the affirmative, it is under the teaching of Ex Parte, Commonwealth of Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, state action inhibited by the first section of the Fourteenth Amendment.

7. If this question is answered in the negative, then the action of Dobbs Houses, Inc. is merely private conduct and however discriminatory or wrongful it may be is not action inhibited by the Fourteenth Amendment. Shelley v. Kraemer, 334 U. S. 1, 13; Williams v. Howard Johnson's Restaurant, 268 F. 2d 845.

8. The defendant, City of Atlanta, contends that the municipality in owning and operating the municipal airport was acting in a proprietary capacity and not in a governmental capacity and that its acts are not state action.

This question has been decided adversely to this defendant's contention by the United States Court of Appeals for the Fifth Circuit in City of St. Petersburg v. Alsup, 238 F. 2d 830.

9. The defendants further contend that the city had executed to Dobbs Houses, Inc. a valid lease to the space in the

Atlanta Airport Terminal where the restaurant is operated with no purpose of discrimination, no joinder in the enterprise or reservation of control by the city, and that the acts of Dobbs Houses, Inc. are not the acts of the City of Atlanta, but is merely private conduct of Dobbs Houses, Inc., a private corporation.

This question has seemingly been decided adversely to the defendants' contentions by the United States Court of Appeals for the Fifth Circuit in the case of Derrington v. Plummer, 240 F. 2d 922, 925(4).

10. It is the contention of the defendants however, that under the facts here, this case comes within the exception recognized in Derrington v. Plummer, supra, wherein the court in that case said:

> [fol. 87] "No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person."

Assuming no purpose of discrimination on the part of the city here and further assuming no joinder in the enterprise and no express reservation of control by the terms of the lease, in order to bring this case within the above quoted exception in Derrington v. Plummer, supra, this Court must find that the leased space was not used or needed for city purposes.

The lease contract itself describes the space leased to Dobbs Houses, Inc. referred to as "restaurant concession" as being " . . . certain space on the first floor of the new terminal building located on the above described municipal airport . . . for the conduct, operation and maintenance of a dining room, kitchen, storeroom, etc. . . . ".

In Derrington v. Plummer, supra, the Court said:

"... the basement of the courthouse can by no means be termed surplus property not used nor needed for County purposes. To the contrary, the courthouse had just been completed, built with public funds for the use of the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. Without more justification than is shown in this case, no court could countenance the diversion of such property to a purely private use.

"Further, the express purpose of the lease was to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. If the County had rendered such a service directly, it could not be argued that discrimination on account of race would not be violative of the Fourteenth Amendment. The same result inevitably follows when the service is rendered through the instrumentality of a lessee; and in rendering such service the lessee stands in the place of the County. His conduct is as much state action as would be the conduct of the County itself."

11. Under the facts in this case the Court holds that the conduct of Dobbs Houses, Inc. is as much state action as [fol. 88] would be similar conduct of the City of Atlanta itself and that the discrimination practiced by Dobbs Houses, Inc. in refusing to serve Negroes except upon a segregated basis is violative of plaintiff's rights as a Negro citizen under the equal protection provision of the Fourteenth Amendment. Plaintiff is entitled to the injunctive relief as prayed.

A judgment in conformity with the findings and conclusions here made may be prepared and presented.

This the 5th day of January, 1960.

BOYD SEGAM
United States District Judge

[fol. 89]

ATTACHMENT TO PETITION FOR REARGUMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil No. 10704

LINWOOD A. JONES, JR., WELDON W. CHRISTOPHER, and DONALD K. LYLES

v.

MARVA THEATRES, INC., and THE CITY OF FREDERICK

Filed: January 5th, 1960

Thomsen, Chief Judge

In this action Negro plaintiffs seek an injunction against segregated seating arrangements or any other kind of discrimination in a theatre, owned by the City of Frederick Md., part of the City Hall building, on city-owned property, but leased to Marva Theatres, Inc. (Marva), a private motion picture theatre operator.

The theatre, known as the City Opera House, was built in 1875 as a place of public assembly. The same entrance serves the City Hall and the Opera House. Since 1927 the Opera House has been leased to private motion picture theatre operators. The term of the current lease, which was made after competitive bidding, is from October 1, 1950 to September 30, 1960. As part of the lease agreement Marva made substantial repairs and improvements.

No state or local law requires or prohibits segregation in theatres, and the lease contains no specific provision with respect thereto. However, the lease includes furniture, equipment and certain facilities which are described in the exhibit attached to the lease as "box office", "colored box [fol. 90] office", "men's toilet", "colored men's toilet", "ladies' toilet", and "colored women's toilet".

The lease provides that the theatre shall be operated not less than six afternoons and nights a week, despite the fact that it is not a percentage lease, and limits the type of shows which may be presented. The City of Frederick reserved the right to use the Opera House or to grant its use to others four days a year. This privilege is generally exercised, and free use of the Opera House has been granted to various social, educational and other organizations.

Marva operates the City Opera House as a motion picture theatre open to the public seven days a week. It does not now maintain a racially segregated box office, but does maintain racially segregated seating and toilet facilities. It reserves the first floor of the main auditorium and the front of the balcony exclusively for white patrons; the back rows of seats in the balcony are set aside exclusively for Negro patrons. The decision as to the seating arrangements was made by Marva's president, carrying out the policy which had prevailed there for some time. He felt it was the only policy he could profitably pursue. A similar policy has been followed for several years by the Tivoli Theatre, the only other theatre operating in the city.[1]

Plaintiffs are Negroes, bacteriologists, residents of Frederick, and are employed at Fort Detrick on the edge of the City.

On or about March 10, 1958, they were refused admission to the first floor of the main auditorium of the Opera House solely because of their race. They were directed by Marva's employees to the section of the balcony which is set aside exclusively for Negro patrons.

If the plaintiffs or any other Negroes were again to pre- [fol. 91] sent themselves for admission to the first floor of the main auditorium of the Opera House, Marva would refuse to admit them to that section for the sole reason that they are Negroes.

The City of Frederick has desegregated all public facilities under its control, but it took the position at the hearing that the existing lease gave it no authority to dictate to

[1] A third theatre is presently closed and is probably unusable [several words illegible].

Marva, one way or the other, what the seating arrangements in the theatre should be.

In view of these facts, at the conclusion of the hearing, I inquired of counsel whether it might be possible to dispose of the case by an agreement of the parties that any lease of the theatre for a term beginning after September 30, 1960, should contain a provision against discrimination, and that in the meantime the plaintiffs would refrain from pressing their claimed rights. The plaintiffs and the N.A.A.C.P., which has been supporting their suit, agreed to such a disposition, if promptly made and supported by an appropriate decree. The Board of Aldermen of the City of Frederick promptly adopted the following resolution, approved by the Mayor: "If the City of Frederick offers the City Opera House for rent after the expiration of the current lease on September 30, 1960, it will include a requirement that the lessee operate said City Opera House without discrimination on the basis of race, color or creed. It is understood, however, that this agreement is not a commitment on the part of the City to lease the said City Opera House after September 30, 1960, if the space is required for governmental or other proper municipal purposes." Counsel for plaintiffs prepared a form of decree, going somewhat beyond the resolution, to which counsel for the City was willing to agree with reasonable modifications, but Marva refused to agree to any injunction even if limited to a possible extension of the existing lease or a holding over after the present term.

During the period occupied by these discussions, Marva, [fol. 92] through a newly-organized and wholly-owned subsidiary, Frederick Theatres, Inc., purchased the Tivoli Theatre and took over the lease of the other (closed) theatre. Marva also assigned to the new corporation its lease of the City Opera House. It has been refurnishing the Tivoli Theatre and intends to operate it and it alone after the beginning of the year 1960. Marva has sought release from its obligations under the existing lease of the Opera House, and has threatened to sue the City of Frederick for damages as a result of the instant case, although its counsel was unable to suggest to the court any possible basis for such a suit. The intransigent attitude of the thea-

tre company and the resulting delays have caused plaintiffs to withdraw their offer to settle, and they now press for a decree in this action. Counsel for the City says that it will stand by the resolution of October 26, 1959, quoted above, but is considering using the Opera House for additional office space or other municipal purposes. Under these circumstances, plaintiffs are entitled to a decree declaring their rights.

In *Department of Conservation & Development* v. *Tate*, (4 Cir.), 231 F.2d 615, the Court said: "It is perfectly clear under recent decisions that citizens have the right to the use of the public parks of the state without discrimination on the ground of race. Dawson v. Mayor and City Council of Baltimore, 4 Cir., 220 F.2d 386, affirmed 350 U.S. 877, 76 S. Ct. 133; Holmes v. City of Atlanta, 350 U.S. 879, 76 S. Ct. 141. And we think it equally clear that this right may not be abridged by the leasing of the parks with ownership retained in the state. See Lawrence v. Hancock, D.C., 76 F. Supp. 1004, 1009; Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971, 74 S. Ct. 783, 98 L. Ed. 1112. And it is no ground for abridging the right that the parks cannot be operated profitably on a nonsegregated basis."

In *Derrington* v. *Plummer*, (5 Cir.), [Illegible] 353 U.S. 924, where discrimination by a [Illegible] cafeteria in a county courthouse was enjoined [fol. 93] [Illegible] doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person."

It is debatable whether this theatre could be considered surplus property, within the exception stated in *Derrington*. But a place of public assembly, a part of the City Hall, leased under an agreement which contemplated segregation, comes within the rule announced in *Tate*. Under the facts in this case, including the terms of the lease and of the exhibit attached thereto, the exclusion of Negroes from the

main floor of the auditorium and the front of the balcony in the City Opera House and the maintenance of racially segregated toilet facilities therein violate the Fourteenth Amendment.

The action of the City has been so fair, in line with its fine traditions, that the court will not enter an injunction against it.

Plaintiffs have asked for an injunction so broad that the City would not be able to allow religious, social or fraternal groups to use the Opera House for a single day for their own purposes if they limit admission to members or other ticket holders. Frederick is not a large city, with the many private facilities available in metropolitan areas. Racial equality can be achieved without an injunction which prohibits any private meeting on public property at any time.

I had originally thought that there were equities in favor of allowing Marva to maintain its present arrangements until the end of the term of its lease, September 30, 1960, so that it might not be handicapped in recovering the investment it had made in repairing and improving the Opera [fol. 94] House during the present lease. But Marva's recent actions have weakened those equities. I will issue an injunction against Marva Theatres, Inc., its subsidiary, Frederick Theatres, Inc., and their respective officers, agents and employees, enjoining further discrimination by them on the property leased from the City.

Rozel Thomsen
Chief Judge, U.S. District Court

[fol. 95]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

[Title omitted]

ORDER DENYING PETITION FOR REARGUMENT—
February 4, 1960

And Now, To-Wit, this fourth day of February, A. D. 1960, the Petition for Reargument filed by the Appellee having been duly considered by the Court,

It Is Ordered that the Petition of the Appellee for Reargument be and it hereby is denied.

By Order of the Supreme Court:

T. E. Townsend Jr., Clerk.

[fol. 96]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MANDATE—February 4, 1960

To the Honorable the Chancellor of the State of Delaware in and for New Castle County:

Greeting:

Whereas, before you or some of you in a cause entitled as follows:

Civil Action No. 1029

WILLIAM H. BURTON, Plaintiff,

v.

THE WILMINGTON PARKING AUTHORITY, ET AL., Defendants

a certain judgment or order was entered on the 11th day of May 1959, to which reference is hereby made; and

Whereas, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on January 12 1960, a certified copy of which is attached hereto;

On Consideration Whereof It Is Ordered and Adjudged that the said judgment or order be and it is hereby reversed, with costs, hereby taxed in the sum of Twelve Dollars ($12.00) to be recovered by The Wilmington Parking Authority, et al. against William H. Burton, with right of execution; and the said cause is hereby remanded with instructions to take such further proceedings therein as

may be necessary in conformity with the opinion of this Court.

Witness The Honorable Clarence A. Southerland, our Chief Justice at Dover, the First day of January, A.D. 1960.

Issued February 4, 1960.

T. E. Townsend Jr., Clerk of the Supreme Court.

[fol. 97]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 38, 1959

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Appellants,

vs.

WILLIAM H. BURTON, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 28, 1960

I. William H. Burton, the appellant herein, hereby gives notice that he hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Delaware entered in this action on January 11, 1960, petition for re-argument having subsequently been filed by this appellant pursuant to proper practice in said Court and having been denied by said Court on February 3, 1960.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

Supreme Court of the United States, and include in said transcript the following:

Complaint

Answer of The Wilmington Parking Authority

Answer of Eagle Coffee Shoppe, Inc.

[fol. 98] Motion for Summary Judgment by Defendant Eagle Coffee Shoppe, Inc.

Motion for Summary Judgment by Defendant The Wilmington Parking Authority

Affidavit of Jay C. Pownall

Notice of Motion, Motion to Amend Answer of Eagle Coffee Shoppe, Inc., and Order Thereon

Affidavit of Robert W. Andrews

Affidavit of Earl C. Jackson

Stipulation, Notice of Motion and Motion of Plaintiff for Summary Judgment

Opinion of Vice Chancellor

Order Granting Plaintiff's Motion for Summary Judgment, Enjoining Defendants, and Staying Order

Notice of Appeal

Opinion of Supreme Court of Delaware issued January 11, 1960, reversing Judgment and Order of Vice Chancellor in the Court of Chancery

Judgment of Supreme Court of Delaware Reversing Order and Judgment of Court of Chancery

Petition for Re-argument

Order of Supreme Court denying Petition for Re-argument.

III. The following questions are presented by this appeal:

1. Whether a statute of the State of Delaware, viz., Title 24, Delaware Code of 1953, Section 1501, construed and applied by the Supreme Court of the State of Delaware to authorize and permit the lessee of a restaurant in a structure maintained and operated by a public agency of the State of Delaware to refuse food service to appellant herein, solely on the ground of race, color or ancestry, is repugnant to the Fourteenth Amendment to the Constitution of the United States?

2. Whether a statute of the State of Delaware, viz., Title 24, Delaware Code of 1953, Section 1501, construed and applied by the Supreme Court of the State of Delaware [fol. 99] to authorize and permit discrimination against appellant, solely on the ground of race, color or ancestry, in a structure owned, maintained and operated by a public agency of the State of Delaware, is repugnant to the Fourteenth Amendment to the Constitution of the United States?

3. Whether a structure which originates as the public property of an agency of the State of Delaware and is being used only to effectuate a public purpose of State Government so loses its character as entirely public property when a portion of it is leased to a private lessee that said lessee is unaffected in use of the leased portion by the restraints of the Fourteenth Amendment?

4. Whether the Supreme Court of Delaware, upon the record before it and upon the basis of judicially noticed court record in another case to which appellant herein was not a party, erred in concluding that the appellee, lessee of a restaurant in a structure owned, maintained and operated by an agency of the State of Delaware, was immune from the restraints of the Fourteenth Amendment?

5. Whether a statute of the State of Delaware, viz., Title 24 of the Delaware Code of 1953, Section 1501, which provides that no keeper of a restaurant shall be obliged to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business, and defines "customers" as all who have occasion for enter-

tainment and refreshment, is so vague and indefinite as to offend the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Louis L. Redding, Attorney for William H. Burton, Appellant.

Proof of Service (omitted in printing).

[fol. 99a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 100] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 101]

SUPREME COURT OF THE UNITED STATES

No. 164—October Term, 1960

WILLIAM H. BURTON, Appellant,

vs.

WILMINGTON PARKING AUTHORITY ET AL.

Appeal from the Supreme Court of the State of Delaware.

ORDER POSTPONING JURISDICTION—October 10, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

October 10, 1960.



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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 1424 164

WILLIAM H. BURTON,

Appellant,

—v.—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and,

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

JURISDICTIONAL STATEMENT

LOUIS L. REDDING
LEONARD L. WILLIAMS
923 Market Street
Wilmington 1, Delaware

Counsel for Appellants

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IN THE

Supreme Court of the United States

October Term, 1959

No. .....

WILLIAM H. BURTON,

Appellant,

—v.—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

Jurisdictional Statement

Appellant, William H. Burton, appeals from the judgment of the Supreme Court of the State of Delaware of January 11, 1960, reversing a judgment of the Delaware Court of Chancery, which had enjoined the Wilmington Parking Authority, an agency of the State and its lessee, Eagle Coffee Shoppe, Inc., from refusing food service to appellant because he is a Negro. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented. In the alternative, should this Court deem appeal to be an inappropriate mode of review,

appellant prays that this jurisdictional statement be considered as a petition for writ of certiorari.

Opinions Below

The opinion of the Supreme Court of Delaware is reported at 157 A. 2d 894 (1960). The opinion of the Court of Chancery is reported at 150 A. 2d 197 (1959). These opinions are reprinted herewith in Appendix A.

Jurisdiction

This suit was brought by appellant, William H. Burton, as a class action in the Court of Chancery of the State of Delaware, in and for New Castle County, for a declaratory judgment and injunctive relief against the Wilmington Parking Authority, a public agency of Delaware, which owns and operates a large public garage in downtown Wilmington, and its lessee, Eagle Coffee Shoppe, Inc., to restrain, as a denial of equal protection of the laws secured by the Fourteenth Amendment, the refusal to serve appellant, solely because he is a Negro. The judgment of the Supreme Court of Delaware,[1] reprinted *infra* Appendix C, reversing the declaratory judgment and injunction granted by the Court of Chancery, was entered on January 11, 1960; and on February 4, 1960, the Supreme Court of Delaware without opinion denied reargument. Notice of appeal was filed in the latter court on April 28, 1960. The jurisdiction of this Court to review by appeal is conferred by 28 United States Code §1257(2). Alternative grounds for review by

[1] The decision of the Supreme Court of Delaware, as will appear later, sustained the validity of a statute of the State of Delaware, viz., 24 Delaware Code, §1501, upon which appellees justified the racial discrimination which the Court of Chancery had held forbidden by the Fourteenth Amendment to the Constitution of the United States.

Writ of Certiorari are found in 28 U. S. C., §§1257(3) and 2103. The following decisions sustain the jurisdiction of this Court to review the judgment by appeal in this case: *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Poulos* v. *New Hampshire*, 345 U. S. 395; *Ill. ex rel. McCollum* v. *Board of Education*, 333 U. S. 203. For authority to consider this appeal as petition for writ of certiorari, see *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230; *Union Nat'l Bank* v. *Lamb*, 337 U. S. 38, 39-40.

Questions Presented

Appellees admit that refusal to serve appellant, a Negro, in a restaurant operated under lease from the Wilmington Parking Authority and located in its public garage was "because of his [appellant's] race, color and ancestry." (Record: Document #10 in Court of Chancery.) Appellees defend this racial discrimination as authorized and justified by Title 24, Delaware Code 1953, Section 1501, which provides that a restaurateur shall not be obliged "to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers and would injure his business." There was no showing at all concerning offense to customers or injury to business. Against appellant's insistence that, if interpreted and applied to permit discrimination against him solely because of race, the statute was unconstitutional, the court below affirmed such interpretation and application. The questions presented in this context are:

1. Whether Title 24, Delaware Code, Section 1501, construed and applied by the Supreme Court of the State of Delaware to authorize and permit a restaurateur to discriminate solely on the ground of race, is repugnant to the Fourteenth Amendment to the Constitution of the United States.

2. Whether where this statute is construed and applied to authorize racial discrimination in a restaurant leased within the garage of the Wilmington Parking Authority, a publicly owned entity of the state, Fourteenth Amendment rights are denied.

Statutes Involved

Title 24, Delaware Code, §1501 and Title 22, Delaware Code, Chapter 5, are set forth herein in Appendix B.

Statement

Appellant, a Negro resident in Wilmington, Delaware, on August 14, 1958, parked his automobile in the public parking structure of appellee Wilmington Parking Authority (Authority) and then proceeded into a restaurant operated in the parking facility. There he sought food service and was refused, solely because of his race (Complaint and amended answer, Record: Documents #1 and #10 in Chancery).

The Authority is a public body corporate and politic, established by the City of Wilmington, Delaware, pursuant to 22 Delaware Code, Ch. 5, to construct and operate a facility for off-street parking of automobiles. That statute declares that the purposes for which a parking authority shall exist and operate are "public" uses. The Authority has the power of eminent domain. The land on which this facility is erected, however, was acquired through negotiated purchases, the purchase money coming from three sources: revenue bonds issued on the credit of the Authority, cash donated by the City of Wilmington, a bank loan to the Authority. Later the City of Wilmington gave the Authority $1,822,827.69 which was applied to redemption of revenue bonds and to repayment of the bank loan. The structure itself was erected solely from the proceeds of the

Authority's revenue bonds (Affidavit of Jay C. Pownall, Authority chairman, Record: Document #7 in Court of Chancery).

Title 22, Delaware Code, Ch. 5, §504(a) (Appendix B, *infra*) provides that the Authority may lease portions of the first floor of the facility for commercial use where such leasing is necessary and feasible for the financing and operation of such facilities. The Authority is required to be financially self-sustaining (*Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 339, 105 A. 2d 614, 1954). The Authority determined that it would be feasible to erect and operate the structure only if, in addition to fees from parking, there was income from commercial leasing of space in the structure.

Appellee Eagle Coffee Shoppe, Inc. (Eagle), a Delaware corporation, leased certain space from the Authority in April, 1957, for twenty years with a ten year option to renew. This lease required Eagle to operate a restaurant, dining room, banquet hall, cocktail lounge and bar and to engage in no other business (Affidavit of Jay C. Pownall, Authority chairman, Record: Document #7 in Court of Chancery). Eagle covenanted to "occupy and use the leased premises in accordance with all applicable laws of any federal, state or municipal authority." The Authority has the right to enforce the provisions of the lease in strict accordance with its terms. (Record: Document #6, i.e., appendix of appellant, appellee below, in Supreme Court of Delaware.)

Appellant, on August 20, 1958, filed in the Delaware Court of Chancery a complaint in a class action against the Authority and Eagle. This complaint alleged that the Authority, "acting through the instrumentality of its lessee," Eagle, "using and occupying a portion of said public facility," had refused food service to appellant, solely because of his race. This refusal the complaint alleged to be con-

duct of an agency of the State of Delaware, depriving appellant of the equal protection of the laws in violation of the Fourteenth Amendment.

When the Vice Chancellor rendered the decision of the Court of Chancery, there had been filed in that court the complaint, answers by appellees, which included an admission by Eagle that appellant was refused service because of his race, color and ancestry (Eagle's amended answer, Record: Document #10, in Chancery); motions for summary judgment by the Authority and Eagle, a countermotion for summary judgment by appellant, and affidavits in support of the motions. Appellees' motions for summary judgment set forth, in essence, two grounds: (1) that operation of the restaurant in the parking facility was the private business of Eagle and independent of control by the Authority; (2) that under a Delaware statute, 24 Delaware Code §1501, Eagle was permitted to refuse service to appellant.

The Vice Chancellor's decision, 150 A. 2d 197, Appendix A, *infra*, denying appellees' motions for summary judgment and granting appellant's motion, held the Authority to be an agency of the State engaged in furnishing a public parking service in a public facility and that the Fourteenth Amendment is applicable to all aspects of the structure and forbids discriminatory practices in the restaurant. It was "incumbent on the Authority;" the Vice Chancellor concluded, "to negotiate and enter into leases on terms which would require the tenant to carry out the Authority's duty not to deny to Delawareans the equal protection of the laws" (150 A. 2d 197, 199). Deciding thus, the Vice Chancellor stated it was unnecessary to consider appellees' reliance on 24 Delaware Code, §1501.

The Supreme Court of Delaware was of the opinion (157 A. 2d 894, Appendix A, *infra*) that the only concern the

Authority had with Eagle was the receipt from Eagle of rent, "without which it [the Authority] would be unable to afford the public the service of off-street parking." It therefore concluded that Eagle's discriminatory act was not that of the Authority. Accordingly, having decided that Eagle, lessee of the Authority, was acting in a "purely private capacity," the Supreme Court, in the face of Eagle's admission that it refused to serve appellant because of his color, and because of color alone, with no evidence at all before it on the question of "offense" to other customers, or "injury" to business (operative terms of the statute), held that 24 Delaware Code §1501 authorized Eagle to refuse to serve appellant solely on the basis of race, and reversed the Vice Chancellor.

How the Federal Questions Are Presented

The federal questions in this case are presented and were disposed of in the courts below in the following manner:

a. Initially, a Federal question is presented by the complaint which alleges that the Wilmington Parking Authority in the operation of a publicly owned structure and the Authority's lessee, Eagle, discriminated against appellant on the ground of race in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Pursuant to regular state practice appellant's trial court brief (Record: Document #11. in Chancery) opposing appellees' brief in support of their motion for summary judgment, argued that Eagle was so closely identified with the Authority in effectuating its public purpose that the Fourteenth Amendment rules applicable to the state agency applied. Appellant's argument was sustained by the judgment of the trial court.

b. Second, a federal question was raised by appellant in the trial court on appellees' motion for summary judgment

based on the ground that 24 Delaware Code §1501 permits Eagle to refuse service to appellant on the ground of race. In accordance with Delaware practice, appellant's brief urged that, if the Delaware statute were applied to authorize Eagle to make discriminatory regulations based solely on race, the discriminatory exclusion by Eagle emanated not from its private action but under the aegis and sanction of discriminatory legislative action, which is state action of a kind prohibited by the Fourteenth Amendment.

c. Again, in the Supreme Court of Delaware, defending the judgment below, each of the above arguments raising a federal question was made by appellant's brief (Record: Document #7 in Supreme Court of Delaware) in the mode appropriate to raise such questions under state law. In that court also, consonant with the admission in the record that appellant was refused food service only because of his race, appellees argued that 24 Delaware Code §1501 permits Eagle to exclude appellant although none of the factors enumerated in the statute (i.e. offensiveness and injury to business) were established in the record. The Authority argued below that "no issue of fact [was] raised by application of Section 1501" and that the Court below could, as a "short cut," take judicial notice that appellant is "a member of a class of persons offensive to a 'major part' of cafe customers . . . a notorious and self-evident fact" (Brief of Wilmington Parking Authority, Record: Document #3 in Supreme Court of Delaware, p. 15). Appellant insisted below that the statute so construed would violate the Fourteenth Amendment (Record: Document #6 in Supreme Court of Delaware, p. 22). However, the Supreme Court of Delaware held that Eagle was a private enterprise immune from the Fourteenth Amendment, that the Authority was not constitutionally answerable for the racial discrimination of which appellant complains; and it applied and enforced the statute as authorizing Eagle to exclude appellant

because of his race notwithstanding complete absence of evidence as to appellant's offensiveness or any injury he would do Eagle's business.

The Questions Are Substantial

Appellant submits that the questions involved herein are substantial and merit plenary consideration by this Court. The opinion below conflicts with a consistent line of decisions by this Court, United States Courts of Appeals, District Courts, and the highest courts of several states on important federal constitutional questions. Because appellant prays that this jurisdictional statement be considered in the alternative as a petition for a writ of certiorari pursuant to 28 U. S. C. §§2103, 1257(3) in the event that appeal is deemed an inappropriate mode of review, it is suggested respectfully that the conflict of decisions and the public importance of the questions involved afford sound basis for the exercise of this Court's certiorari jurisdiction.

This case involves questions of the responsibility of a state government agency and the lessee of a portion of a building owned and maintained by it to accord equal treatment to Negro citizens as well as the constitutionality of a state statute interpreted by the court below to authorize appellant's exclusion from such facility solely because of his race.

It is plainly of great public importance to our nation that our courts, both state and federal, give full and fair implementation to the equalitarian principles of the Fourteenth Amendment to the Constitution of the United States and protect all citizens from racial discrimination at the hands of governmental agencies. The freedom of citizens

from racial discrimination by the state is of fundamental importance to our system and basic in our national ideals.[2]

I

This case presents the question of whether the Supreme Court of Delaware may employ 24 Del. Code §1501 as justification for appellee Eagle's exclusion of appellant from its restaurant. After arriving at the conclusion that Eagle is a private enterprise immune from the Fourteenth Amendment, the court below turned to the statute which justifies barring a would-be patron if he is offensive to a majority of an establishment's patronage and his presence would injure the business. There was not a whit of evidence on offensiveness or injury to business. There is only the admission that appellant was excluded solely because of his race. Appellee's brief merely prayed that the state Supreme Court take notice of the "notorious" and "self-evident" fact that Negroes are offensive. On this foundation and nothing more, the Delaware Supreme Court held that Eagle was exonerated by the statute. It is now too well established to require any extended argument that a statute which authorizes racial distinctions is patently violative of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Gayle* v. *Browder*, 352 U. S. 903.

This case also presents the racial discrimination question in a context that has recurred in litigation over a number of years, as the list of authorities cited below indicates. The overwhelming weight of authority in cases involving racial discrimination in state-owned leased property is that governmentally owned properties and facilities managed by lessees and concessionaires, holding no governmental office,

[2] See, e.g.: Cooper v. Aaron, 358 U.S. 1, 19, 20; Gibson v. Mississippi, 162 U.S. 565, 591-592.

are subject to the restraints of the Fourteenth Amendment against racial discrimination. *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971, vacating and remanding 202 F. 2d 275 (6th Cir. 1953) (leased open air theater); *Tate* v. *Department of Conservation*, 133 F. Supp. 53 (E. D. Va. 1955), aff'd 231 F. 2d 615 (4th Cir. 1956), cert. den. 352 U. S. 838 (leased beach); *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. den. 353 U. S. 924 (leased cafeteria); *City of Greensboro* v. *Simkins*, 246 F. 2d 425 (4th Cir. 1957), affirming 149 F. Supp. 562 (M. D. N. C. 1957) (leased golf course); *Aaron* v. *Cooper*, 261 F. 2d 97 (8th Cir. 1958) (leased school); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948) (leased swimming pool); *Jones* v. *Marva Theatres Inc.*, 180 F. Supp. 49 (D. C. Md. 1960) (leased motion picture theatre); *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E. D. Va. 1949) (leased restaurant); *Coke* v. *City of Atlanta*, —— F. Supp. —— (N. D. Ga., January 6, 1960) (leased restaurant), cited with approval in *Henry* v. *Greenville Airport Commission*, —— F. 2d —— (4th Cir. 1960); *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948) (leased swimming pool); *Kern* v. *City Commissioners*, 151 Kans. 565, 100 P. 2d 709 (1940) (leased swimming pool). Cf. *Lincoln Park Traps* v. *Chicago Park District*, 323 Ill. App. 107, 55 N. E. 2d 173, 175, 176 (1944) (leased skeet shooting range).

II

Both appellees justified the racial discrimination practiced against appellant by Title 24 Delaware Code §1501, which provides that a restaurant proprietor may exclude anyone "whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business." Appellant contended below that this statute would be unconstitutional under the Fourteenth

Amendment it applied to permit his exclusion on the basis of race alone. The Supreme Court of Delaware upheld the appellees' argument finding that the statute justified the exclusion of appellant on the record presented.

In this connection it must be noted that there was no allegation, proof, or suggestion that appellant was "offensive" to any of appellees' customers in any way or would have any effect on appellees' business. Appellees admit that the exclusion was solely because of race and rely simply on appellant's presumed offensiveness because of his race to establish their right to exclude him. The Court below adopted this construction of the statute, thus interpreting the statute to specifically provide for the exclusion of Negroes as such. So interpreted and applied to the appellant the statute patently violates the Fourteenth Amendment, for that amendment prohibits not only legislation which explicitly works a racial discrimination but "state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." *Civil Rights Cases*, 109 U. S. 3, 11. It matters not that this racial proscription was read into the statute by judicial construction, rather than written into it by the legislature. Racial discrimination by judicial action is as unconstitutional. *Shelley* v. *Kraemer*, 334 U. S. 1.

Here one state statute created a governmental agency and authorized it to acquire property and lease portions of it to private businesses, and another statute authorized the exclusion of plaintiff from the leased premises owned by the government simply upon the basis of race and nothing more. The hand of government weighs heavily indeed in the racial discrimination imposed upon appellant. Under well settled principles he is entitled to relief against state conduct of this sort.

III

Moreover, the decision below upholds racial discrimination in a state-owned facility contrary to well settled interpretations of the Fourteenth Amendment. The court below has reached a result contrary to that in all of the cases cited above, *supra*, p. 11, plainly a gross departure from the law. Beyond this, the opinion below rests on standards which, if not overruled, will not only deprive countless Delaware citizens of constitutional rights, but will introduce a standard corrosive of the well settled "state action" rule governing state-owned leased property. The decision below appears to rest on the following conclusions pertinent to this aspect of the case:

1. Although the Wilmington Parking Authority is a creature of the state and performs a public function as an agency of the state, only $934,000, "approximately 15% of the total cost is represented by the public 'advance' of money" (157 A. 2d at 901). Such "a slight contribution is insufficient" to warrant a finding of state action (*id.* at 901). Moreover, "Eagle at its own expense installed the major portion of the furnishing of its restaurant" while "the Authority installed a bare minimum [of fixtures] in the space ultimately leased to Eagle" (*id.* at 899).

2. The eating-place, which is a part of the structure built, owned, and operated by the Wilmington Parking Authority and from which appellant was excluded because of his race, is operated by a private lessee. It was, the Court below held, entirely "immaterial to the Authority what type of business should occupy the space now occupied by Eagle. The Authority's sole interest was in obtaining money in the form of rent." Further: "It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a

lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking" (*id.* at 901).

3. The Court below took judicial notice of the fact that the "main and marked public entrance" to the Eagle restaurant is from the street and not within the garage (*id.* at 899), and concluded that the Authority does not operate the business of Eagle, "has not located the business of Eagle within the facility for the convenience and service of the public using the parking service, and has not financially enabled the business of Eagle to operate" (*id.* at 902).

4. The judicial philosophy, which compelled the result in the light of the above, was stated as follows:

> . . . We apply the law, whether or not that law follows the current fashion of social philosophy.
>
> Particularly, is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone (*id.* at 901-902).

As will be more fully indicated *infra*, appellant contends that the exact cost figures and the proportion of funds derived from what the court below deemed "public" and "non-public" sources in connection with the Authority's project are unimportant and have no proper bearing upon the deci-

sion as to whether or not the Fourteenth Amendment applies to the appellees. However, it is well to point out some subsidiary errors made by the court below.

a. The court below said that $934,000 was "advanced" by the City of Wilmington to purchase land for the parking facility, and that this was the only "public" contribution of funds. This figure is found in another opinion involving the Authority, which was rendered prior to actual construction of the parking facility, *Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 439, 105 A. 2d 614, 618 (1954).[1] However, the figure is in conflict with undisputed facts in the present record which go unmentioned in the opinion below. It appears from *this* record that:

> Subsequently *the City of Wilmington gave the Authority $1,822,827.69* which sum the Authority applied to the redemption of the Revenue Bonds delivered to Diamond Ice & Coal Co. and to the repayment of the Equitable Security Trust Company loan." (Emphasis supplied) (Affidavit of Jay C. Pownall, Chairman of appellee parking authority; Record: Document #7 in Chancery Court).

b. The court below also said that the $934,000 advance (discussed above) was but 15% of the total cost of the facility which is reasoned by the court (from facts outside this record) to have been $6,100,000. This latter figure

---

[1] Where constitutional rights are involved this Court will make its "own independent examination of the record," Napue v. Illinois, 360 U.S. 264, 271, 272, and is not bound by the conclusions of the court below, Spano v. New York, 360 U.S. 315, 316; Norris v. Alabama, 294 U.S. 587; Niemotko v. Maryland, 340 U.S. 268; and cases collected in Napue, supra, at 360 U.S. 264, 272, note 4.

[2] In that "test case" the authority sued a taxpayer for a declaration that 22 Del. Code Chapter 5 was valid. Ruling on certified questions the court held the statute valid. Appellant Burton was not a party to the case.

(not mentioned in *Ranken*) was hypothesized by the court from a ratio between the estimated cost of a garage without space for commercial leasing (estimated between $3,600,000 and $3,800,000 at the time of *Ranken;* 105 A. 2d at 618), and a *planned* allocation of costs between parking and leased areas, indicated by *Ranken* to be 38.4% for parking spaces and 61.6% for leased areas.

Appellant's petition for reargument below (Record: Document #10 Supreme Court of Delaware) urged that the cost figure derived by the court was not only outside the record of this case, but was in fact erroneous and very much greater than the actual cost of the facility, which error thereby minimized what the court below considered to be the extent of the "public" contribution.

Certainly either the court's figure ($934,000) or the figure in the Authority chairman's affidavit (over $1,800,000) represents a substantial contribution by the public. But not only did the court make an unwarranted determination that the above contribution was "slight." In addition, the court indulged the erroneous assumption that funds derived by the Authority through public sale by it, a governmental agency, of its revenue bonds are not "public" funds and that their use is not controlled by the Fourteenth Amendment. Appellant contends to the contrary that all of the funds used in erecting the Authority building were "publicly" raised and administered, and that the rule stated in *Cooper* v. *Aaron*, 358 U. S. 1, 4, is applicable here, i.e.: "state participation through any arrangement, management, funds or property" is sufficient to invoke the Fourteenth Amendment's prohibition of racial discrimination.[5] *Pennsylvania* v. *Board of Directors of City Trusts*, 350 U. S. 230, held that public trustees, whose official position made

[5] Note the subsequent application of this rule in Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958) (leasing arrangement condemned).

them agents of the State of Pennsylvania, could not administer in a racially discriminatory manner even a trust fund created by an individual out of his own private fortune. The same principle applies to the various funds involved in connection with the property of the appellee Authority.

The decision below also rests on the court's inquiry into whether Eagle was established in the parking building in furtherance of a specific governmental purpose to provide restaurant service for the public. The court concluded that the Authority's purpose was simply to obtain rent needed to make the building financially self-sustaining. It held that since the Authority's purpose was not to provide a restaurant, the restaurant in its building is immune from the restraints of the Fourteenth Amendment.

Appellant urges that the state's purpose in arranging that the restaurant be installed on its property is irrelevant. In passing, it should be observed that the holding below conflicts with conclusions in the *Ranken* case where commercial leasing of this property was sustained as merely an incidental use which "does not destroy the public character of the project as a whole," such leasing being "deemed a use of public property subordinate to the public use" (105 A. 2d 614).

But more fundamental, inquiry into the government's purpose, like inquiry into the ratio between the general public funds contributed to build the facility and the funds raised by the sale of the Authority's bonds, is beside the point. While such factors perhaps have played a part in cases of discrimination where government participation has not risen to the extent of full ownership, this type of analysis has not been indulged in cases of property owned by the government and leased for "private" operation. Compare *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (4th Cir. 1945), cert. den. 326 U. S. 721, with the lease cases cited *supra*, p. 11. Heretofore it has been plain

that governmentally owned property and facilities must not be operated so as to work racial discrimination—no matter what the property arrangements, financing methods or purposes. *Cooper* v. *Aaron, supra.*

To uphold the decision of the Supreme Court of Delaware would encourge a rule requiring inquiries in each case of racial discrimination upon government property into the government's purpose, the apportionment of expenditures and profits between government and its lessee (and, between different methods of government financing), and into the specific nature of the rights reserved by governmental authorities in leases and contracts. Such a rule would introduce confusion into one of the few areas of "state action" jurisprudence where the law has heretofore been simple and clearly predictable. Negro citizens' rights to equal treatment under such a rule would depend upon chance factors such as the refinements of local property and contract law and the ingenuity of governmental officials in developing property and financial arrangements in connection with the use of government facilities. As recently stated by this Court in connection with illegal searches and seizures, subtle and gossamer distinctions of property law ought not be determinative of constitutional rights. *Jones* v. *United States*, —— U. S. ——, 4 L. ed. 2d 697, 705.[6]

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[6] At 4 L.ed 2d 705 the Court wrote:

> We are persuaded however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive due consideration has led to the discarding of these distinctions in the homeland of the common law. . . . Distinctions such as those between "lessee", "licensee", "invitee" and "guest", often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

Distinctions between the "primary" use and "subordinate" use of government property, and between money from general public treasuries and money raised by the sale of the bonds of a public agency, have little relevance to the question of whether or not the activities complained of are within the reach of the Fourteenth Amendment's nullification of "state action of every kind" which denies citizens the equal protection of the laws. *Civil Rights Cases*, 109 U. S. 3, 11.

The decision below on the question of "state action" conflicts with the decision in *Derrington* v. *Plummer*, 240 F. 2d 922, *supra*. In *Derrington* v. *Plummer*, *supra*, the cafeteria in a county-owned courthouse was held constitutionally forbidden to discriminate on the basis of race. The cafeteria was operated by a private entrepreneur. If as is suggested by the rationale of the Delaware Supreme Court, the cafeteria in *Derrington* served a governmental purpose only in that it was a food service facility provided for the use of courthouse personnel, litigants, witnesses and other persons in the building on business, a rule of nondiscriminatory service would reasonably extend to such persons alone. But it does not appear that the plaintiff in *Derrington* was other than a member of the general public. More recently in *Jones* v. *Marva Theatres, Inc.*, 180 F. Supp. 49 (D. C. Md. 1960), a motion picture theatre housed in the city opera house of Frederick, Maryland, in which the city hall also is situated, was held forbidden to discriminate. It can hardly be suggested that the motion picture theatre in *Jones* fulfilled any more of a public purpose than the cafeteria here, yet Judge Thomsen enjoined the lessee in that case from discriminating on the basis of race. Probably an important function of the theatre was to furnish the city with revenue, as there was another theatre in the town.

Certainly the concept of "public" purposes has expanded greatly in recent years. Yet the reports are replete with decisions, cited p. 11, *supra*, holding that governmentally-owned golf courses, swimming pools and park facilities may not discriminate on the basis of race, even though leased to private operators. But at bottom, even if a public purpose test were to be applied in this case, the Eagle restaurant does serve a public purpose, and the Supreme Court of Delaware has so held, i.e., paying rental which permits the parking authority to operate its garage—which otherwise would be running a loss—for the benefit of the downtown section of Wilmington, Delaware.

The court's conclusion that the Authority has not "financially enabled the business of Eagle to operate" is a meaningless truism if it merely reiterates that the arrangement is not unprofitable to the Authority. If the statement implies that Eagle does not also profit from the arrangement, it surely has no basis, for there is no suggestion in the record that Eagle anticipated and realized no profit from its business under the arrangement with the Authority. In this case, as in other cases of leased state property such as *Derrington* v. *Plummer*, *supra*, *Jones* v. *Marva Theatres, Inc.*, *supra*, *Nash* v. *Air Terminal Services*, *supra*, and *Coke* v. *City of Atlanta*, *supra*, the lease was obviously negotiated with respective expectations that the arrangement would be financially profitable to both lessee and lessor.

The Authority cannot excuse itself from obedience to the Fourteenth Amendment by arguing that it is powerless because it has bartered away for twenty years, with a ten year renewal option, to a lessee, its right to insist on equal treatment for Negroes. Cf. *Cooper* v. *Aaron*, 358 U. S. 1.

Despite the attention which the court below devoted to the question of control it ignored one overwhelming and

dispositive factor. The authority owns the fee. At the time it negotiated the lease it was empowered to impose upon the lessee a requirement of nondiscrimination. If the lessee would not have agreed to such a clause, the Authority under the Fourteenth Amendment, should have found a lessee who would have consented. Clearly in Wilmington, Delaware, the record demonstrates (Record: Documents #12 and #13 in Chancery), such a lessee would not have been difficult to come by.

It is submitted that the Vice Chancellor was eminently correct when he wrote that "it was incumbent on the Authority to negotiate and enter into leases such as the one here involved on terms which would require the tenant to carry out the Authority's constitutional duty not to deny to Delawareans the equal protection of the laws" (150 A. 2d 197, 199). Previous attempts by states to divest themselves of the power to insist on nondiscrimination have been exposed and state responsibility has been recognized. See *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. denied 333 U. S. 875 (discrimination in South Carolina primary unconstitutional although state had repealed statutory references to primary); *Terry* v. *Adams*, 345 U. S. 461; *Smith* v. *Allwright*, 321 U. S. 649.

Neither can the Authority's excuse that it was merely engaged in a proprietary or a money-making venture justify racial discrimination on its property, by removing it from the ambit of the Fourteenth Amendment. See *City of St. Petersburg* v. *Alsup*, 238 F. 2d 830 (5th Cir. 1956), cert. den. 353 U. S. 922 where a distinction between "proprietary" functions and "governmental" functions was rejected as a basis for applicability of Fourteenth Amendment safeguards.

CONCLUSION

For the foregoing reasons it is submitted that this cause presents substantial federal constitutional questions of public importance which merit plenary consideration by this Court for their resolution.

Respectfully submitted,

LOUIS L. REDDING
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Wilmington 1, Delaware
Counsel for Appellant

APPENDIX A

Opinion of Chancery Court

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON,

Plaintiff,

—vs—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Defendants.

(April 15, 1959)

MARVEL, Vice Chancellor: Plaintiff, admittedly a person within the jurisdiction of the State of Delaware and a citizen, brings this class action for a declaratory judgment in the form of injunctive relief against the action of the defendant, Eagle Coffee Shoppe Inc., a purveyor of foodstuffs and beverages, in refusing to serve him at its restaurant. It is admitted that plaintiff was refused service at such restaurant solely because he is a Negro, and all parties have moved for summary judgment on the basis that there is no material fact in dispute.

The Wilmington Parking Authority, which owns the space in which the Eagle Coffee Shoppe is located, is alleged to be an agency of the State and to have acquiesced in and

consented to a discriminatory practice of the restaurant violative of the Fourteenth Amendment to the Constitution of the United States, and is therefore joined as a defendant to this class action.

There is no doubt but that the Fourteenth Amendment forbids any state action which denies to any person within its jurisdiction the equal protection of the laws. However, the Parking Authority, while clearly a State agency, disclaims any control over the policies of its tenant, the restaurant. It contends that it has not purported to dictate to the restaurant as to how its business should be run, and that the lease granted the Eagle Coffee Shoppe is a strictly business transaction between landlord and tenant, consummated as a corollary to the creation of rental space in the parking facility in question for the express purpose of defraying in large part the financing and operation of such public facility.

Obviously, the Fourteenth Amendment plays no part in purely private acts of discrimination, its force coming into play when a state or one of its agencies or subdivisions fails to deal equally with any person within its jurisdiction.

In deciding whether or not discrimination violative of the Fourteenth Amendment has occurred, Courts make a determination as to whether or not the property involved in the action is in effect publicly owned, and if there is no clear showing of public ownership, whether or not state control is being exercised over a privately owned facility.

Thus, in Eaton v. Board of Managers (C. A. 4), 261 F2nd, the fact that a hospital established pursuant to public law was succeeded by a privately built hospital operated by its own board, thereby removing the hospital from the category of a publicly owned institution,[1] compelled a holding that Negro doctors did not have a constitutional right to insist

[1] The only public moneys currently received by the hospital were paid by the County for the care of indigent patients.

that they not be barred from hospital staff status solely because of their race or color. Compare Mitchell v. Boys Club (D. C. Dist. of Columbia), 157 F. Supp. 101, and Kerr v. Enoch Pratt Free Library (C. A. 4), 149 F2nd 212.

On the other hand, when a Negro seeks rights in property owned by a state agency or by a state political sub-division, the device of a lease of such property to a concessionaire will not serve to insulate the public authority from the force and effect of the Fourteenth Amendment, Lawrence v. Hancock (D. C. S. D. W. Va.), 76 Supp. 1009 (a public swimming pool), and there would seem to be no valid basis for distinction when the leasing of space by a public authority is not a patent attempt at subterfuge but a good faith method of furnishing service to the public through a tenancy, Derrington v. Plummer (C. A. 5), 240 F2nd 922, cert. denied, 353 U. S. 924 (a restaurant in a county courthouse), and Nash v. Air Terminal Services, Inc. (D. C. E. D. Va.), 85 F. Supp. 545 (a restaurant in a federally owned airport and so subject to the Fifth Amendment).

Conversely, where there are no public moneys or property involved, discrimination may be constitutionally forbidden because of the existence of governmental control over the operation of a privately owned institution or facility, Commonwealth of Pennsylvania v. Board of City Trusts, 350 U. S. 230.

There is no doubt but that the Parking Authority is a tax exempt agency of the State engaged in furnishing public parking service in a facility, the financing of which is being borne in large part by rentals received from tenants occupying other parts of the building, Wilmington Parking Authority v. Randolph (Sup. Ct. Del.) 105 A2nd 614. Because these rentals constitute a substantial and integral part of the means devised to finance a vital public facility, in my opinion it was incumbent on the Authority to negotiate and enter into leases such as the one here involved on terms

which would require the tenant to carry out the Authority's constitutional duty not to deny to Delawareans the equal protection of the laws. To say that the Authority had no statutory power to operate the restaurant itself is to beg the question in view of the direct relation of rental income to the financing of the facility.

The lease here provides that the tenant " . . . shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority," and despite the Authority's disclaimer of control over the policies and practices of the Eagle Coffee Shoppe, I am satisfied that the Fourteenth Amendment to the Constitution of the United States is applicable to the operation of all aspects of the structure here involved, and that it forbids discriminatory practices in the restaurant in which plaintiff seeks to establish class rights.

Plaintiff is entitled to a declaratory judgment to such effect. In view of this holding it is unnecessary to consider the common law pertaining to innkeepers or defendants' reliance of §1501 of Title 24, Del. C. as a purported modification of such common law rule.

An appropriate order may be submitted denying defendants' motions and granting plaintiff's motion for a declaratory judgment as prayed for in the complaint.

Order

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON,

Plaintiff.

—vs.—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Defendants.

IT IS HEREBY ORDERED as follows:

1. That the Motions for Summary Judgment filed, respectively, by the defendant, The Wilmington Parking Authority, and the defendant, Eagle Coffee Shoppe, Inc., are hereby denied.

2. That plaintiff's Motion for Summary Judgment is hereby granted.

3. That the policy, practice, rules, regulations and usage of the defendants, or either of them, denying, by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro, the right and privilege to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the restaurant operated by the defendant Eagle Coffee Shoppe, Inc., in

the parking facility owned by defendant Wilmington Parking Authority and situate on the Southerly side of Ninth Street between Orange and Shipley Streets, in Wilmington, Delaware, are hereby declared in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. The defendants, their officers, agents, members and employees are hereby permanently enjoined from denying, by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro the right to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the aforementioned restaurant.

5. That the court costs of this action be assessed against the defendant.

s/ WILLIAM MARVEL
Vice-Chancellor

APPROVED AS TO FORM

s/ CLAIR JOHN KILLORAN
Attorney for Wilmington Parking Authority

s/ THOMAS HERLIHY, JR.
Attorney for Eagle Coffee Shoppe, Inc.

s/ LOUIS L. REDDING
Attorney for Plaintiff

Opinion of Supreme Court of Delaware

IN THE
SUPREME COURT
OF THE STATE OF DELAWARE

No. 38, 1959

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Appellants,

—vs.—

WILLIAM H. BURTON,

Appellee.

(January 11, 1960)

SOUTHERLAND, *C.J.*, WALCOTT and BRAMHALL, *JJ.*, sitting.

Appeal from the Court of Chancery in and for New Castle County.

WOLCOTT, *J.*:

This action seeks a declaratory judgment that Eagle Coffee Shop, Inc. (hereafter Eagle), the lessee of Wilmington Parking Authority (hereafter the Authority) may not operate its restaurant business in the parking structure at Ninth and Shipley Streets, Wilmington, in a racially-discriminatory manner. The action was commenced by the plaintiff, a Negro, who was denied service by Eagle solely because of his race, color and ancestry, which, plaintiff argues, abridged his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

There are no disputed issues of fact. Consequently, all parties below moved for summary judgment. The Vice-Chancellor granted judgment for the plaintiff, holding that the Fourteenth Amendment is applicable to the operation of all aspects of the parking structure, and that it forbids discriminatory practices in the restaurant of the Authority's lessee. The defendants appeal.

The plaintiff's position is that the Authority is performing a public or state function in operating the public parking facility in question and, as an instrumentality of the state, is required to insure that the operation of the public facility shall not be in a racially-segregated manner. Plaintiff further argues that Eagle, as lessee, is the instrumentality of the Authority, admittedly an agency of the state, and that its discriminatory acts are in law the acts of the state and, hence, violative of the Equal Protection Clause of the Fourteenth Amendment. The court below so ruled.

The Authority's position is that it has not discriminated racially against the plaintiff because it has no legal or *de facto* control over the operation of Eagle's restaurant. It argues that its sole interest in the Eagle lease is the deriving of rent therefrom in order to defray the expense of operating the parking facility, an otherwise unprofitable operation required, however, to be self-sustaining. Accordingly, the Authority argues that Eagle's refusal to serve the plaintiff was private and not state action subject to the interdict of the Fourteenth Amendment.

Eagle joins in the position taken by the Authority and, in addition, relies on 24 *Del. C.*, §1501 which provides that no restaurant shall by law be obligated to give service to persons if such service would be offensive to the major part of its customers to the injury of its business. This statute, Eagle argues, is a codification of the common law relating to the duties of restaurant keepers.

Since the decision of the Supreme Court of the United States in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 74 S. Ct. 686, the states and their instrumentalities have been required to act within the scope of state action in a racially non-segregated manner. If, therefore, Eagle is, as plaintiff contends, the ultimate instrumentality of the state performing a state function, the Fourteenth Amendment requires it to serve the plaintiff and all others with his racial background.

The ultimate question for our determination, therefore, is whether or not, under the decisions cited to us, the Eagle restaurant business is cast with such public character as to make it in law a state function, carried on under the auspices and with the support of the public authority. We turn to the authorities cited to us for the answer.

Nash v. *Air Terminal Services, Inc., et al.*, 85 F. Supp. 545, was a case decided under the now discarded doctrine of separate but equal facilities for Negroes. The case, however, seems pertinent not only because of its factual resemblance to the case at bar but, also, as an enunciation of a test for determining when certain actions may or may not be attributed to the public government.

In the *Nash* case the plaintiff, a Negro using the facilities of the Washington National Airport for air transportation, sought and was refused service in a restaurant operated in the terminal building. The restaurant in question was operated on a concession from the public government in a building constructed entirely with public money and operated for the serving of persons using an airport constructed entirely with public money. Under these facts it was held that the plaintiff had been denied his rights since, at the time, there were no separate but equal facilities offered for Negro patrons of the airport. *A fortiori*, if the failure to supply separate but equal facilities at a time when that

doctrine was part of our constitutional law was a deprivation of the rights of the plaintiff, once that doctrine is struck down the plaintiff's rights would be denied by the refusal of any service.

Derrington v. *Plummer*, 240 F. 2d 922, dealt with the refusal of service to a Negro in a cafeteria installed and operated in the basement of a county courthouse. The facts were that some time in 1953 the county contemplated the erection of a new courthouse. In the plans of the building a portion of the basement was set aside and reserved for a cafeteria to be operated primarily for the benefit of persons having business in the courthouse. The courthouse, including the cafeteria facilities, was completed entirely with public funds. Thereafter, the cafeteria was operated by a private lessee. The cafeteria served persons having business in the courthouse and public employees, and, also, was open to the public. The plaintiff, a Negro, sought service and was refused because of his race.

It was held that the lessee was subject to the prohibitions of the Fourteenth Amendment as the agent of the state. The rationale of the decision is that the courthouse having been built with public funds for the use of the public, the original plans having provided for the inclusion of a cafeteria for the use of the public, and the cafeteria, itself, having been equipped and furnished by the county, the state could not avoid the constitutional requirement of nondiscrimination by leasing to a private business.

Culver v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82, was a case in which the plaintiffs, Negro citizens of Ohio, sought the right to use and enjoy a municipal swimming pool, built at public expense. It appeared that when completed the swimming pool had first been opened on a non-discriminatory racial basis but that, from that, trouble and disorder had ensued. The city ceased to operate the swimming pool and leased it to a veterans organization at

an annual rental of 10% of the gate receipts: the city, however, paying all maintenance costs. The veterans organization, the lessee, operated the pool in a racially-discriminatory manner.

It was held that the lease to the veterans organization was a subterfuge adopted by the city to avoid the requirements of the Fourteenth Amendment. The court was of the opinion that, under the circumstances, the veterans organization was an instrumentality of the city which, in turn, of course, was an instrumentality of the State of Ohio and, thus, was subject to the provisions of the Fourteenth Amendment.

Substantially to the same effect is the case of *Kern* v. *City Com'rs of City of Newton, et al.*, 151 Kan. 565, 100 P. 2d 709.

Muir v. *Louisville Park Theatrical Assn.*, 347 U.S. 971, 74 S. Ct. 783, was a case in which the City of Louisville had erected in one of its public parks an amphitheater, owned and maintained by the city. It appeared that the amphitheater was an appropriate adjunct of the city's park maintained for all the people. The city leased the structure to a theatrical association which, under the terms of its lease, had the right to charge admission fees and to sell refreshments. The plaintiff, a Negro, was denied admittance to a performance in the amphitheater given by the theatrical association.

The District Court held, and was affirmed on appeal to the Court of Appeals, that the city was guilty of no racial discrimination because there was no evidence that any comparable Negro theatrical association had applied to the city for use of the amphitheater. On petition for certiorari to the Supreme Court of the United States the judgment in the *Muir* case was reversed and the case remanded for consideration in the light of *Brown* v. *Board of Education*, supra.

The reason for the reversal is not set forth in full, but it seems apparent that the Supreme Court had in mind the circumstances that the city had built and maintained from public funds an amphitheater for public use and, under the circumstances, any lessee operated it as an instrumentality of the city.

Pennsylvania v. *Directors of City Trusts*, 350 U. S. 230, 77 S. Ct. 1281, was a *per curiam* opinion holding that the trustees under the will of Stephen Girard, appointed by the City of Philadelphia, could not perform their duties under the trust created for the education of "white male orphans" in a manner to discriminate against Negro male orphans. Plaintiff points out that Stephen Girard, by his will, had created a trust out of his private fortune but that, nevertheless, the principles of the Fourteenth Amendment were held to apply to the operation of the trust by the trustees. The element of public control, apparently, was that the trustees of the Girard Trust were publicly appointed trustees in complete control of the operation of a privately endowed trust.

We think a careful consideration of the foregoing cited authorities leads necessarily to the conclusion that the provisions of the Fourteenth Amendment relating to equal protection of the laws apply to the operation of any facility or any other thing created at public expense or operated by public authority.

In the *Nash* case, for example, the air terminal at the Washington National Airport had been erected solely with public funds and the restaurant involved had been contemplated initially as a service to persons using the National Airport. Furthermore, it is not clear that the public government did not exercise ultimate control over operation of the restaurant since it was operated as a concession of the public government.

Similarly, the *Derrington* case involved a facility constructed entirely with public funds which contained, from the planning stage onward, a cafeteria intended for the use of the public. The cafeteria, itself, was constructed and equipped by public money and was operated primarily for the benefit of the persons using the courthouse. Consequently, while technically there may have been no direct control over the lessee who operated the cafeteria, the lessee was nevertheless operating a facility erected entirely by the public treasury for the purpose of serving the public.

The *Culver* and *Kern* cases were cases also of publicly paid for facilities. These cases also contain the additional circumstance of an attempt by subterfuge to avoid the prohibitions of the Fourteenth Amendment. The *Muir* case similarly is a case of the erection and maintenance entirely with public funds of an appropriate adjunct of a public park.

The *Girard College* case apparently falls within the scope of the Fourteenth Amendment solely by reason of the fact that the trustees administering the trust created by Stephen Girard were publicly appointed. It is interesting to note that since the *per curiam* decision of the Supreme Court of the United States, the State of Pennsylvania has abrogated the right of the City of Philadelphia to appoint the trustees administering the Girard Trust, thus, presumably, eliminating the requirement that such trust be administered in a racially non-discriminatory manner. Cf. *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844, cert. den. 357 U.S. 570.

It thus seems apparent to us from the cited authorities that the Fourteenth Amendment is applicable to the operation of a facility, either public or quasi-public in nature, if either the facility has been erected and is maintained with public money, or if the operation of such a facility is conducted under public auspices or control.

We turn now to the particular facts of the case at bar. Initially, we should observe that the plaintiff in the case at bar has not been discriminated against by the Authority in the operation of the public parking portion of the facility since the record discloses that at the time this incident occurred the plaintiff had parked his car in the public parking portion and, thereafter, proceeded to the Eagle restaurant where he was denied service.

The facts surrounding this controversy and the physical aspect of the Authority's facility do not appear in much detail in the record before us. However, we think we are at liberty to take notice of certain physical facts concerning the matter which appear from a casual inspection of the facility, itself. We note, therefore, that the space in the Authority's structure leased by Eagle, while located within the exterior walls of the structure, has no marked public entrance leading from the parking portion of the facility into the restaurant proper. The main and marked public entrance to Eagle's restaurant is located on Ninth Street. It appears from the record before us, furthermore, that Eagle at its own expense installed the major portion of the furnishings of its restaurant and all of the necessary fixtures to make the leased space suitable for the operation of its business. The Authority installed a bare minimum in the space ultimately leased to Eagle.

The lease between the Authority and Eagle contains a covenant binding Eagle to "occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority." Plaintiff refers to this covenant but we think the covenant does not have much bearing on the basic question presented to us. We have for decision the broad question of whether or not the maintenance of the facility by the Authority, admittedly a state instrumental-

ity, is in all its ramifications and details, including the leasing to private business, state action falling within the scope of the protective provisions of the Fourteenth Amendment. The referred to covenant is applicable to this case only if the answer to the broad question is in the affirmative since only under such circumstances would the Fourteenth Amendment be applicable to Eagle's business.

The question is to be decided in the light of the circumstances surrounding this entire matter. The nature of the enterprise conducted by the Authority is of primary importance to our decision. Unfortunately, the record before us is not as complete as we would have desired. We think, however, that we may take notice of the facts embodied in the opinion in *Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 439, 105 A. 2d 614, on which plaintiff relies. In that case we upheld against attack the constitutionality of the Parking Authority Act of 1951 (22 *Del. C.*, Ch. 5) and the legality of the proposed acts of the Authority pursuant to it.

In the *Ranken* case we had before us certain determinations made by the Authority in planning the erection of the facility in question. Thus, the Authority determined that in order to erect and operate the structure as a self-sustaining unit as required by the General Assembly, it would be necessary to obtain additional revenue from commercial leasing of space, and to utilize the space of the final structure upon the following ratio: 61% for parking; 39% for private leases. We assume that the structure as actually completed maintains this ratio. The Authority made a further determination that the cost of construction, including the cost of land, would be divided upon the following ratio: 38.4% to parking space; 61.6% to the leased area. We assume that this estimate of division of cost is the fact. Finally, the Authority determined that its revenue derived from the operation of the facility would come from these

sources upon the following ratio: 30.5% from parking; 69.5% from private leases. We assume this division to be the fact.

From the *Ranken* case it appears that the only public money used in the construction of the facility was the sum of $934,000 "advanced" by the City of Wilmington and used in the purchase of a portion of the land required. It did not appear in the *Ranken* case, and does not appear in the case now before us, what the terms and conditions of this "advance" by the city were.

We have not been furnished with the actual cost figures of the construction of the facility but since, in the *Ranken* case, the cost of construction of a parking facility alone was estimated to be approximately $3,800,000, and since the estimated cost allocated to parking space of a combined facility was 38.4%, we assume that the total cost of the presently existing facility was in the neighborhood of $6,100,000. It does appear as a fact, however, that the actual cost of construction was paid from the proceeds of the sale of revenue bonds issued by the Authority and, accordingly, upon the determined ratios, the public money "advanced" for the project amounts to approximately 15% of the total cost of the facility as finally erected.

From the *Ranken* case, also, it appears that the revenue from parking alone was predicted to be $150,000 annually which was estimated to amount to 30.5% of the total expected revenue ~~of the~~ combined facility. Accordingly, the facility's total revenue we assume to be approximately $342,000 annually, of which approximately $212,000 is derived from the rentals to commercial enterprises.

In the *Ranken* case we considered a constitutional attack upon the Authority's proposal on the basis that it had no authority to enter into private leases solely for the purpose of obtaining revenue to support the operation of the public

part of the facility, viz., the furnishing of off-street parking. We held, however, that the authority to lease to private business was valid. We held that the furnishing of off-street parking was a proper public purpose and met an existing need supported by a legislative finding to that effect and, since it was the fact that the proper public purpose could not be supplied as a self-supporting unit without additional revenue to be supplied by commercial leases, we held that the entering into such private leases did not destroy the public-use character of the facility.

We recognized in the *Ranken* case that the proposed leases to private businesses were wholly unrelated to the public purpose to be subserved by the parking facility, except as a source of additional revenue to permit the financing and operation of the parking facility. We were of the opinion that the supplying of off-street parking services occupying 61% of the total space of the structure, despite the leasing of the balance of the space to private business, was and remained the paramount or primary use of the structure. We held, therefore, that the leasing to private business, while necessary financially to the project, was nevertheless a subordinate or incidental use of public property. We, accordingly, upheld the constitutionality of the grant of power to lease which, in the absence of such circumstances, would have been an unconstitutional use of public property.

We summed up our holding in the *Ranken* case in the following language:

> "Since the dominant or underlying purpose of the contemplated project subserves a public use, commercial leasing of space therein for uses unrelated to the public use is permitted to the extent, and only to the extent, that such leasing is necessary and feasible to enable the Authority to finance the project."

We think it apparent, therefore, that the only connection Eagle has with the public facility operated by the Author-

ity is the furnishing of the sum of $28,700 annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise.

We think the case before us is distinguishable from the cases relied on by the plaintiff. In the first place, it is quite apparent, nor is there any suggestion to the contrary made by the plaintiff, that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility. As far as the record before us indicates, it was immaterial to the Authority what type of business would occupy the space now occupied by Eagle. The Authority's sole interest was in the obtaining of money in the form of rent. That money is thereafter used by the Authority to support the public purpose of supplying off-street parking from which the plaintiff and the rest of the public benefit.

It is further clear from this record, and from the *Rankow* case, that at no time did the Authority contemplate the establishment of a restaurant in the structure for the use of its parking patrons. On the contrary, the commercial leases entered into by the Authority were given to the highest bidders in terms of rent after the solicitation of bids by public advertisement. The decision to lease to a particular lessee was made upon the considerations of the applicants' financial responsibility and the amount of rent agreed to be paid. It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking.

The plaintiff argues that the use of public money to purchase a portion of the land required brings this case within the rule of the cited authorities. But we think not. At the most, approximately 15% of the total cost is represented by the public "advance" of money. To accept the plaintiff's view would require us in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise. It is obvious that there is no guide for judicial speculation upon such a matter. If it is said that the contribution of any public money is sufficient to change the nature of the enterprise, the answer is that it has been held that a slight contribution is insufficient. Cf. *Eaton* v. *Board of Managers*, 164 F. Supp. 191.

Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; if it is not the case, the operators of the enterprise are free to discriminate as they will. *Shelley* v. *Kraemer*, 334 U. S. 1, 68 S. Ct. 842. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy.

Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware.

It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in 24 *Del. C.*, §1501 with respect to restaurant keepers. 10 *Am. Jur., Civil Rights*, §§21, 22; 52 *Am. Jur., Theatres*, §9; *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment.

Finally, plaintiff contends that 24 *Del. C.*, §1501, has no application in the case at bar because Eagle, since it serves alcoholic beverages to its patrons, is a tavern or inn and not a restaurant. It is argued that, at common law, an inn or tavern could deny service to no one asking for it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 *Del. C.*, §1501, which does not compel the operator of a restaurant to give service to all persons seeking such.

For the foregoing reasons, the judgment of the court below is reversed.

APPENDIX B

Statutes

Title 24 Delaware Code, Section 1501:

§1501. Exclusion of customers; definition.

No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business.

As used in this section, "customers" includes all who have occasion for entertainment or refreshment.

Title 22 Delaware Code, Chapter 5, Sections 501-515:

§501. Findings and declaration of policy

It is determined and declared as a matter of legislative finding that—

(1) Residential decentralization in incorporated cities has been accompanied by an ever increasing trend in the number of persons entering the business sections by private automobile as compared with other modes of transportation;

(2) The free circulation of traffic of all kinds through the streets of cities is necessary to the health, safety, and general welfare of the public whether residing in the city or traveling to, through, or from the city, in the course of lawful pursuits;

(3) The great increased use by the public of motor vehicles of all kinds has caused serious traffic congestion on the streets of cities;

(4) The parking of motor vehicles on the streets has contributed to this congestion to such an extent as to interfere seriously with the primary use of such streets for the movement of traffic;

(5) Such parking prevents the free circulation of traffic in, through, and from the city, impedes rapid and effective fighting of fires and the disposition of police forces in the district and endangers the health, safety, and welfare of the general public;

(6) Such parking threatens irreparable loss in valuations of property in the city which can no longer be readily reached by vehicular traffic;

(7) This parking crisis, which threatens the welfare of the community, can be reduced by providing sufficient off-street parking facilities properly located in the several residential, commercial, and industrial areas of the city;

(8) The establishment of a parking authority will promote the public safety, convenience, and welfare;

(9) It is intended that the parking authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;

therefore it is declared to be the policy of this State to promote the safety and welfare of the inhabitants thereof by the creation in incorporated cities of bodies corporate and politic to be known as "Parking Authorities" which shall exist and operate for the purposes contained in this chapter. Such purposes are declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain.

§502. Definitions

As used in this chapter, unless the context requires a different meaning—

"Authority" means a body politic and corporate created pursuant to this chapter;

"Board" means the governing body of the Authority;

"Bonds" means and includes the notes, bonds and other evidence of indebtedness, or obligations, which the Authority is authorized to issue pursuant to section 504 of this title;

"City" means incorporated city or town;

"Construction" means and includes acquisition and construction, and "to construct" means and includes to acquire and to construct, all in such manner as may be deemed desirable;

"Facility" or "facilities" means lot or lots, buildings and structures, above, at, or below the surface of the earth, including equipment, entrances, exits, fencing, and all other accessories necessary or desirable for the safety and convenience of the parking of vehicles;

"Federal agency" means and includes the United States of America, the President of the United States of America, and any department or corporation agency or instrumentality heretofore, or hereafter created, designated, or established by the United States of America;

"Improvement" means and includes extension, enlargement, and improvement, and "to improve" means and includes to extend, to enlarge, and to improve, all in such manner as may be deemed desirable.

"Municipality" means any county, incorporated city or incorporated town of this State;

"Persons" means and includes natural persons;

"Project" means any structure, facility, or undertaking which the Authority is authorized to acquire, construct, improve, maintain, or operate under the provisions of this chapter.

§503. Method of incorporation

(a) Whenever the city council or other governing body of a city desires to organize an Authority, under the provisions of this chapter, it shall adopt an ordinance signifying its intention to do so.

In the event that such ordinance sets forth the proposed articles of incorporation in full it shall not be required, any law to the contrary notwithstanding, in publishing such ordinance, under the provisions of existing law, to publish such proposed articles of incorporation in full, but it shall be sufficient compliance with such law in such publication to set forth briefly the substances of such proposed articles of incorporation and to refer to the provisions of this chapter. Thereafter the city council shall cause a notice of such ordinance to be published at least one time in a newspaper published and of general circulation in the county in which the Authority is to be organized. The notice shall contain a brief statement of the substance of the ordinance, including the substance of such articles, making reference to this chapter, and shall state that on a day certain, not less than three days after publication of the notice, articles of incorporation of the proposed Authority will be filed with the Secretary of State of this State.

(b) On or before the day specified in the notice the city council shall file with the Secretary of State articles of incorporation together with proof of publication of the notice referred to in subsection (a) of this section. The articles of incorporation shall set forth—

(1) The name of the Authority;

(2) A statement that such Authority is formed under the provisions of this chapter;

(3) The name of the city, together with the names and addresses of its council members;

(4) The names, addresses and term of office of the first members of the board of the Authority.

All of which matter shall be determined in accordance with the provisions of this chapter. The articles of incorporation shall be executed by the incorporating city by its proper officer and under its municipal seal.

(c) If the Secretary of State finds that the articles of incorporation conform to law he shall forthwith, but not prior to the day specified in the notice, endorse his approval thereon, and when all proper fees and charges have been paid shall file the articles and issue a certificate of incorporation to which shall be attached a copy of the approved articles. Upon the issuance of such certificate of incorporation by the Secretary of State, the corporate existence of the Authority shall begin when such certificate has been recorded in the office for the recording of deeds in the county where the principal office of the Authority is to be located. The certificate of incorporation shall be conclusive evidence of the fact that such Authority has been incorporated, but proceedings may be instituted by the State to dissolve any Authority which shall have been formed without substantial compliance with the provisions of this section.

(d) When the Authority has been organized and its officers elected, the secretary shall certify to the Secretary of State the names and addresses of its officers, as well as the principal office of the Authority. Any change in the

location of the principal office shall likewise be certified to the Secretary of State within 10 days after such change.

§504. Purpose and powers

(a) The Authority, incorporated under this chapter, shall constitute a public body corporate and politic, exercising public powers of the State as an agency thereof, and shall be known as the Parking Authority of the city, but shall in no way be deemed to be an instrumentality of the city or engaged in the performance of a municipal function. The Authority shall be for the purpose of conducting the necessary research activity, to maintain current data leading to efficient operation of off-street parking facilities, for the fulfillment of public needs in relation to parking, establishing a permanent coordinated system of parking facilities, planning, designing, locating, acquiring, holding, constructing, improving, maintaining and operating, owning, leasing, either in the capacity of lessor or lessee, land and facilities to be devoted to the parking of vehicles of any kind.

The Authority shall not have the power to directly engage in the sale of gasoline, the sale of automobile accessories, automobile repair and service or any other garage service, other than the parking of vehicles, and the Authority shall not directly engage in the sale of any commodity of trade or commerce; provided, however, that the Authority shall have the power to lease space in any of its facilities for use by the lessee for the sale of gasoline, the sale of automobile accessories, automobile repair and service or any other garage service and to lease portions of any of its garage buildings or structures for commercial use by the lessee, where, in the opinion of the Authority, such leasing is necessary and feasible for the financing and operation of such facilities. Any such lease shall be granted by the Authority to the highest and best bidder, upon terms

specified by the Authority, after due public notice has been given, asking for competitive bids; provided, however, that if after such public notice no bid is received and/or the Authority rejects any bid or bids received, thereafter the Authority may negotiate any such lease or leases without further public notice but on a basis more favorable than that contained in any bid or bids rejected, if any. The phrase "due public notice," as used in this section, shall mean a notice published at least 10 days before the award of any such lease in a newspaper of general circulation published in a municipality where the Authority has its principal office, and if no newspaper is published therein, then by publication in a newspaper of general circulation in the County where the Authority has its principal office. The Authority may reject any or all bids if, in the opinion of the Authority, any such lease granted as a result of any such bid or bids would not be adequate or feasible for the financing and operation of such facilities.

(b) Every Authority may exercise all powers necessary or convenient for the carrying out of the aforesaid purposes including, but without limiting the generality of the foregoing, the rights and powers described below.

(1) To have existence for a term of 50 years as a corporation and thereafter until the principal and interest upon all of its bonds shall have been paid or provisions made for such payment, and until all of its other obligations shall have been discharged.

(2) To sue and be sued, implead and be impleaded, complain and defend in all courts.

(3) To adopt, use and alter at will a corporate seal.

(4) To acquire, purchase, hold, lease as lessee, and use any franchise, property, real, personal, or mixed, tangible or intangible, or any interest therein, neces-

sary or desirable for carrying out the purpose of the Authority and to sell, lease as lessor, transfer, and dispose of any property or interest therein at any time required by it.

(5) To acquire by purchase, lease or otherwise, and to construct, improve, maintain, repair, and operate projects.

(6) To make by-laws for the management and regulation of its affairs.

(7) To appoint officers, agents, employees, and servants, to prescribe their duties, and to fix their compensation.

(8) To fix, alter, charge, and collect rates and other charges for its facilities at reasonable rates to be determined exclusively by it, subject to appeal as provided in this paragraph, for the purposes of providing for the payment of the expenses of the Authority, the construction, improvement, repair, maintenance, and operation of its facilities and properties, the payment of the principal of and interest on its obligations, and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such obligation or with the city. Any person questioning the reasonableness of any rate fixed by the Authority may bring suit against the Authority in the Superior Court of the county wherein the project is located. The Superior Court shall have exclusive jurisdiction to determine the reasonableness of rates and other charges fixed, altered, charged, or collected by the Authority. Appeals may be taken to the Supreme Court within 30 days after the Superior Court has rendered a final decision.

(9) To borrow money, make and issue negotiable notes, bonds, refunding bonds, and other evidences of indebtedness or obligations of the Authority; the bonds to have a maturity date not longer than forty years from the date of issue, except that no refunding bonds shall have a maturity date longer than the life of the Authority; and to secure the payment of such bonds or any part thereof by pledge, or deed of trust, of all, or any of its revenues and receipts, and to make such agreements with the purchasers or holders of such bonds, or with others in connection with any such bonds, whether issued or to be issued, as the Authority deems advisable, and in general to provide for the security for the bonds and the rights of the holders thereof.

(10) To make contracts of every name and nature, and to execute all instruments necessary or convenient for the carrying on of its business.

(11) Without limitation of the foregoing to borrow money and accept grants from, and to enter into contracts, leases, or other transactions with, any Federal agency, State of Delaware, municipality, corporation or authority.

(12) To have the power of eminent domain.

(13) To pledge, hypothecate, or otherwise encumber all or any of the revenues or receipts of the Authority, as security for all or any of the obligations of the Authority.

(14) To do all acts and things necessary for the promotion of its business and the general welfare of the Authority to carry out the powers granted to it by this chapter or any other law.

(15) To enter into contracts with the State of Delaware, municipalities, corporations or authorities for the use of any project of the Authority and fixing the amount to be paid therefor.

(16) To enter into contracts of group insurance for the benefit of its employees, and to set up a retirement or pension fund for such employees, similar to that existing in the municipality where the principal office of the project is located.

(c) The Authority shall not at any time, or in any manner, pledge the credit or taxing power of the State of Delaware or any political subdivision, nor shall any of its obligations be deemed to be obligations of the State of Delaware, or of any of its political subdivisions, nor shall the State of Delaware or any political subdivision thereof be liable for the payment of principal or of interest on such obligations.

(d) In addition to the provisions in this chapter provided for the financing of the costs of acquiring lands and premises and for the construction and improvement of parking projects, the Authority may by resolution, as provided in this subsection, establish a benefit district.

(1) One benefit district may be designated for the condemnation of lands for one or several parking stations. The Authority shall determine the percentage of the costs of condemnation which shall be assessable to such benefit district. Not more than 80 per cent of such costs shall be assessable to such benefit district or benefit districts.

(2) After a benefit district has been established, no further proceedings shall be taken unless there is filed with the secretary of the Authority, within sixty days of the passage of the resolution creating the benefit district, a petition

requesting the establishment of such public parking station or stations. Such petition shall be signed by the resident owners of real estate owning not less than 51 per cent of the front feet of the real estate fronting or abutting upon any street included within the limits of the benefit district. In determining the sufficiency of the petition, lands owned by the city, county, State or United States or by nonresident owners of real estate within the benefit district shall not be counted in the aggregate of lands within such benefit district. After any petition has been signed by an owner of land in the benefit district, the change of ownership of the land shall not affect the petition. In any case where the owners of lands within the benefit district are tenants in common, each co-tenant shall be considered a landowner to the extent of his undivided interest in the land. The owner of a life estate shall also be deemed a landowner for the purpose of this chapter. Guardians of minors or insane persons may petition for their wards when authorized by the proper court so to do. Resident owner of land, as defined in this paragraph, shall be any landowner residing in the city and owning land in the benefit district. No suit shall be maintained in any court to enjoin or in any way contest the establishment of such parking stations or the establishment of a benefit district unless the suit be instituted and summons served within 30 days from and after the date of the filing of such petition with the secretary of the Authority.

(3) Whenever the Authority shall have acquired lands for public parking stations and shall have declared and ordered that not more than 80 per cent of the cost of establishing or improving public parking stations, as provided in this subsection, will be paid by the levy of special assessments upon real estate situate in any one or more benefit districts, it shall cause to be made by some competent per-

son an estimate, under oath, of the cost thereof, which estimate shall be filed with the secretary of the Authority. The assessment against the benefit district shall be apportioned among the various lots, tracts, pieces, and parcels of land within the benefit district in accordance with the special benefits accruing thereto, this apportionment of benefit assessments to be made by three disinterested property owners appointed by the mayor of the city or if such city has no mayor, by its chief executive officer within 30 days after the filing of the estimate of the cost of the improvement with the secretary of the Authority. As soon as the amount chargeable against each piece of property is ascertained, the Authority of such city shall by resolution levy such amount against this real estate in the benefit district, which resolution shall be published once in a newspaper of general circulation in such city. No suit to question the validity of the proceedings of the Authority shall be commenced after 30 days from the awarding of a contract for such improvements and until the expiration of the 30 days the contractor shall not be required to commence work under his contract. If no suit shall be filed within such 30 days then all proceedings therefore had shall be held to be regular, sufficient, and valid.

(4) The cost of condemnation and improvement of such public parking stations may be levied and assessed in not to exceed 10 installments, with interest on the whole amount remaining due and unpaid each year at a rate of interest not exceeding 5 per cent per annum. Any owner of land within the benefit district may, within 30 days after the assessment resolution is passed, pay the entire amount assessed against the land. The Authority of such city may assess, levy, and collect the cost of condemnation and improvement of such public parking stations as is assessed against the privately owned property in the benefit district.

The assessment shall constitute a lien from the date the same is assessed by resolution, as provided in this paragraph, against the respective premises against which the same is levied, in the same manner as city taxes on real estate are constituted a lien, and shall be collectible in the manner provided for the collection of taxes assessed against the real estate of the City of Wilmington by monition process, as provided in Chapter 143, Vol. 36, Laws of Delaware.

(e) When any real property or any interest therein heretofore or hereafter acquired by the Authority is no longer needed for the purposes defined in this chapter, or when, in the opinion of the Authority it is not desirable or feasible to hold and use such property for said purposes, the Authority may sell the same at private or public sale as the Authority shall determine, granting and conveying to the purchaser thereof a fee simple marketable title thereto. The Authority may make such sale for such price and upon such terms and conditions as the Authority deems advisable and for the best interests of the Authority and may accept in payment, wholly or partly, cash, bonds, mortgages, debentures, notes, warrants, or other evidences of indebtedness as the Authority may approve. The consideration received from any such sale may be applied by the Authority, in its discretion, to the repayment, in whole or in part, of any funds contributed to the Authority by a municipality under the provisions of section 508 of this title or retained by the Authority for the purposes of this chapter. Without limitation of the foregoing, the Authority may accept as consideration in whole or in part for the sale of any such real property, a covenant, agreement or undertaking on the part of any purchaser to provide and maintain off-street parking facilities on such property or a portion thereof for the fulfillment of public parking needs for such period and un-

der such terms and conditions as the Authority shall determine. Any such covenant, agreement or undertaking on the part of the purchaser as aforesaid and the right of the Authority to fix and alter rates to be charged for any such parking facilities as well as the right of appeal as in this section provided, shall be set forth and reserved in the deed or deeds of conveyance. Any such covenant, agreement or undertaking may be enforced by the Authority in an action for specific performance brought in the Court of Chancery of this State. As amended 49 Del. Laws, Ch. 72, eff. May 14, 1953; 50 Del. Laws, Ch. 222, §1, eff. June 8, 1955; 50 Del. Laws, Ch. 279, §§1, 2, eff. June 13, 1955.

§505. Bonds

(a) The bonds of any Authority referred to and authorized to be issued by this chapter shall be authorized by resolution of the board thereof, and shall be of such series; bear such date or dates; mature at such time or times not exceeding 40 years from their respective dates; bear interest at such rate or rates, not exceeding 6 per cent per annum payable semi-annually; be in such denominations; be in such form, either coupon or fully registered, without coupons; carry such registration, exchangeability, and interchangeability privileges; be payable in such medium or payment and at such place or places; be subject to such terms of redemption, not exceeding 105 per cent of the principal amount thereof; and be entitled to such priorities in the revenues or receipts of such Authority, as such resolution or resolutions may provide. The bonds shall be signed by such officers as the Authority shall determine, and coupon bonds shall have attached thereto interest coupons bearing the facsimile signature of the treasurer of the Authority, all as may be prescribed in such resolution or resolutions. Any such bonds may be issued and delivered notwithstanding that one or more of the officers signing

such bonds, or the treasurer whose facsimile signature shall be upon the coupon, or any officer thereof, shall have ceased to be such officer or officers at the time when such bonds shall actually be delivered.

The bonds may be sold at public or private sale for such price or prices as the Authority shall determine. The interest cost to maturity of the money received for any issue of the bonds shall not exceed 6 per centum per annum. Pending the preparation of the definitive bonds, interim receipts may be issued to the purchaser or purchasers of such bonds and may contain such terms and conditions as the Authority may determine.

(b) Any resolution or resolutions authorizing any bonds may contain provisions which shall be part of the contract with the holders thereof as to (1) pledging the full faith and credit of the Authority for such obligations or restricting the same to all or any of the revenues of the Authority from all or any projects or properties; (2) the construction, improvement, operation, extension, enlargement, maintenance, and repair of the project, and the duties of the Authority with reference thereto; (3) the terms and provisions of the bonds; (4) limitations on the purposes to which the proceeds of the bonds then, or thereafter to be issued, or of any loan or grant by the United States, may be applied; (5) the rate of tolls and other charges for use of the facilities of, or for the services rendered by the Authority; (6) the setting aside of reserves or sinking funds and the regulation and disposition thereof; (7) limitations on the issuance of additional bonds; (8) the terms and provisions of any deed of trust or indenture securing the bonds, or under which the same may be issued, and (9) any other additional agreements with the holders of the bonds.

(c) Any Authority may enter into any deeds of trust indentures or other agreements, with any bank or trust

company or other person or persons in the United States having power to enter into the same, including any Federal agency, as security for such bonds, and may assign and pledge all or any of the revenues or receipts of the Authority thereunder. Such deed of trust, indenture, or other agreement, may contain such provisions as may be customary in such instruments, or as the Authority may authorize, including provisions as to: (1) the construction, improvement, operation, maintenance, and repair of any project and the duties of the Authority with reference thereto; (2) the application of funds and the safeguarding of funds on hand or on deposit; (3) the rights and remedies of the trustee and holders of the bonds which may include restrictions upon the individual right of action of such bondholder, and (4) the terms and provisions of the bonds or the resolutions authorizing the issuance of the same.

(d) The bonds shall have all the qualities of negotiable instruments under the law merchant and the negotiable instruments law of the State of Delaware.

§506. Remedies of bondholders

(a) The rights and the remedies conferred upon or granted to the bondholders in this section shall be in addition to, and not in limitation of, any rights and remedies lawfully granted to such bondholders by the resolution or resolutions providing for the issuance of bonds, or by any deed of trust, indenture, or other agreement under which the same may be issued. In the event that the Authority shall default in the payment of principal of, or interest on any of the bonds, after the principal or interest shall become due, whether at maturity or upon call for redemption, and such default shall continue for a period of 30 days, or in the event that the Authority shall fail or refuse to comply with the provisions of this chapter, or shall default in any

agreement made with the holders of the bonds, the holders of 25 per cent in aggregate principal amount of the bonds then outstanding by instrument or instruments filed in the office of the recorder of deeds of the county, and proved or acknowledged in the same manner as a deed to be recorded, may appoint a trustee to represent the bondholders for the purpose provided in this section.

(b) Such trustee, and any trustee under any deed of trust, indenture or other agreement, may, and upon written request of the holders of 25 per cent or such other percentages as may be specified in any deed of trust, indenture, or other agreement, in principal amount of the bonds then outstanding, shall, in his or its own name—

(1) By mandamus, or other suit, action or proceeding at law or in equity, enforce all rights of the bondholders, including the right to require the Authority to collect rates, rentals or other charges adequate to carry out any agreement as to or pledge of the revenues or receipts of the Authority, and to require the Authority to carry out any other agreements with or for the benefit of the bondholders, and to perform its and their duties under this chapter;

(2) Bring suit upon the bonds;

(3) By action or suit in equity require the Authority to account as if it were the trustee of an express trust for the bondholders;

(4) By action or suit in equity enjoin any acts or things which may be unlawful or in violation of the rights of the bondholders;

(5) By notice in writing to the Authority declare all bonds due and payable, and if all defaults shall be made good, then with the consent of the holders of 25 per

cent or such other percentage as may be specified in any deed of trust, indenture, or other agreement, of the principal amount of the bonds then outstanding, to annul such declaration and its consequences.

(c) The Court of Chancery in and for the county wherein the Authority is located shall have jurisdiction of any suit, action or proceedings by the trustee on behalf of the bondholders. Any trustee when appointed or acting under a deed of trust, indenture, or other agreement, and whether or not all bonds have been declared due and payable, shall be entitled as of right to the appointment of a receiver, who may enter and take possession of the facilities of the Authority or any part or parts thereof, the revenues or receipts from which are, or may be, applicable to the payment of the bonds in default, and operate and maintain the same, and collect and receive all rentals and other revenues thereafter arising therefrom, in the same manner as the Authority or the board might do, and shall deposit all such moneys in a separate account and apply the same in such manner as the court shall direct. In any suit, action or proceeding by the trustee the fees, counsel fees and expenses of the trustee, and of the receiver, if any, and all costs and disbursements allowed by the court shall be a first charge on any revenues and receipts derived from the facilities of the Authority, the revenues or receipts from which are or may be applicable to the payment of the bonds in default. The trustee shall, in addition to the foregoing, have and possess all of the powers necessary or appropriate for the exercise of any functions specifically set forth in this section, or incident to the general representation of the bondholders in the enforcement and protection of their rights.

(d) Nothing in this section, or any other section of this chapter, shall authorize any receiver appointed pursuant

to this chapter for the purpose of operating and maintaining any facilities of the Authority to sell, assign, mortgage, or otherwise dispose of, any of the assets of whatever kind and character belonging to the Authority. It is the intention of this chapter to limit the powers of such receiver to the operation and maintenance of the facilities of the Authority as the court shall direct; and no holder of bonds of the Authority, nor any trustee shall ever have the right in any suit, action or proceedings at law or in equity to compel a receiver, nor shall any receiver ever be authorized, or any court be empowered to direct the receiver to sell, assign, mortgage, or otherwise dispose of, any assets of whatever kind or character belonging to the Authority.

§507. Governing body.

(a) The powers of each Authority shall be exercised by a board composed of five members, all of whom shall be residents of the city creating the Authority. The mayor of the city, or if such city or town has no mayor, its chief executive officer, shall appoint the members of the board, one of whom shall serve for one year, one for two years, one for three years, one for four years, and one for five years from the first day of July in the year in which such Authority is created as provided in this chapter. Thereafter the mayor shall not sooner than 60 days, nor later than 30 days prior to July first in each year in which a vacancy occurs, appoint a member of the board for a term of five years to succeed the member whose term expires on the first day of July next succeeding. Vacancies for unexpired terms that occur more than 60 days before the end of a term shall be promptly filled by appointment by the mayor. All such appointments shall be subject to the confirmation of the city council or other governing body of the city. Any member of the board may be removed for cause by the mayor, or if such city or town has no mayor, by its chief executive officer.

with the concurrence of two-thirds of all the members of the council, or other governing body of the city or town, and the person against whom such charges are made shall be given a reasonable opportunity to make his defense.

(b) Members shall hold office until their successors have been appointed and may succeed themselves. A member shall receive no compensation for his services, but shall be entitled to the necessary expenses, including traveling expenses, incurred in the discharge of his duties.

(c) The members of the board shall select from among themselves a chairman, a vice-chairman, and such other officers as the board may determine. The board may employ a secretary, an executive director, its own counsel and legal staff, and such technical experts and such other agents and employees, permanent or temporary, as it may require, and may determine the qualifications and fix the compensation of such persons. Three members of the board shall constitute a quorum for its meetings. Members of the board shall not be liable personally on the bonds or other obligations of the Authority, and the rights of creditors shall be solely against such Authority. The board may delegate to one or more of its agents or employees such of its powers as it deems necessary to carry out the purposes of this chapter, subject always to the supervision and control of the board. The board shall have full authority to manage the properties and business of the Authority and to prescribe, amend, and repeal by-laws, rules and regulations governing the manner in which the business of the Authority may be conducted, and the powers granted to it may be exercised and embodied.

§508. Acquisition of lands; cost financing by municipality

* * * * * *

The Authority may acquire by purchase or eminent domain proceedings either the fee or such rights, title, inter-

est, or easement in such lands, as the Authority deems necessary for any of the purposes mentioned in this chapter. No property devoted to a public use, nor any property of a public service company, property used for burial purposes, places of public worship, nor property which on June 21, 1951 was used as a facility or facilities for the parking of motor vehicles, so long as the property is continuously so used, and so long as the operation of the facility complies with parking and traffic ordinances of the city shall be taken under the right of eminent domain. The right of eminent domain shall be exercised by the Authority in the manner provided by chapter 61 of Title 10.

The right of eminent domain conferred by this section may be exercised only within the city.

Court proceedings necessary to acquire property or property rights, for purposes of this chapter, shall take precedence over all caus not involving the public interest in all courts to the end that the provision of parking facilities be expedited.

Any municipality establishing an Authority under this chapter may, under such terms and conditions as it may deem appropriate, provide for and pay to such Authority such sum or sums of money necessary to acquire in whole or in part the lands upon which such Authority may undertake to erect a parking facility as herein provided and/or such sum or sums of money necessary to construct in whole or in part a parking facility or facilities as herein provided; the municipality for the purpose of providing said money may issue its general obligation bonds secured by the faith and credit of the municipality. The aggregate amount of general obligation bonds issued by a municipality under this provision shall be in addition to and not within the limitations of any existing statutory debt limitation of the municipality. As amended 49 Del. Laws, Ch. 2, eff. June 4, 1953; 50 Del. Laws, Ch. 221, §1, eff. June 8, 1955.

§509. Moneys; examination of accounts

All moneys of any Authority, from whatever source derived, shall be paid to the treasurer of the Authority. The moneys shall be deposited, in the first instance by the treasurer in one or more banks or trust companies, in one or more special accounts. The moneys in the accounts shall be paid out on the warrant or other order of the chairman of the Authority, or of such other person or persons as the Authority may authorize to execute such warrants or orders. Every Authority shall have at least an annual examination of its books, accounts and records by a certified public accountant. A copy of such audit shall be delivered to the city creating the Authority. A concise financial statement shall be published annually at least once in a newspaper of general circulation in the city where the principal office of the Authority is located. If such publication is not made by the Authority the city shall publish such statement at the expense of the Authority. If the Authority fails to make such an audit then the auditor or accountant designated by the city may, from time to time, examine at the expense of the Authority, the accounts and books of the Authority, including its receipts, disbursements, contracts, leases, sinking funds, investments, and any other matters relating to its finances, operation, and affairs.

The Attorney General of the State may examine the books, accounts and records of any Authority.

§510. Competition in award of contracts

(a) All construction, reconstruction, repairs, or work of any nature made by any Authority, where the entire cost, value, or amount of such construction, reconstruction, repairs, or work including labor and materials, shall exceed $500, except reconstruction, repairs, or work done by employees of the Authority, or by labor supplied un-

der agreement with any Federal or State agency with supplies and materials purchased as provided in this section, shall be done only under contract or contracts to be entered into by the Authority with the lowest and best bidder, upon proper terms, after due public notice has been given, asking for competitive bids as provided in this section. No contract shall be entered into for construction or improvement or repair of any project, or portion thereof, unless the contractor shall give an undertaking with a sufficient surety or sureties, approved by the Authority, and in an amount fixed by the Authority for the faithful performance of the contract. All such contracts shall provide, among other things, that the person or corporation entering into such contract with the Authority will pay for all materials furnished and services rendered for the performance of the contract, and that any person or corporation furnishing such materials or rendering such services may maintain an action to recover for the same against the obligor in the undertaking, as though such person or corporation was named therein, provided the action is brought within one year after the time the cause of action accrued. Nothing in this section shall be construed to limit the power of the Authority to construct, repair, or improve any project or portion thereof, or any addition, betterment, or extension thereto directed by the officers, agents, and employees of the Authority or otherwise than by contract.

(b) All supplies and materials costing $500 or more shall be purchased only after due advertisement as provided in this section. The Authority shall accept the lowest bid or bids, kind, quality, and material being equal, but the Authority may reject any or all bids or select a single item from any bid. The provisions as to bidding shall not apply to the purchase of patented and manufactured products offered for sale in a noncompetitive market, or solely by a manufacturer's authorized dealer.

(c) The terms, advertisement or due public notice, wherever used in this section shall mean a notice published at least 10 days before the award of any contract in a newspaper of general circulation published in a municipality where the Authority has its principal office, and if no newspaper is published therein, then by publication in a newspaper of general circulation in the county where the Authority has its principal office.

(d) No member of the Authority or officer or employee thereof shall either directly or indirectly be a party to, or be in any manner interested in, any contract or agreement with the Authority for any matter, cause, or thing whatsoever by reason whereof any liability or indebtedness shall in any way be created against such Authority. If any contract or agreement shall be made in violation of the provisions of this section the same shall be null and void and no action shall be maintained thereon against such Authority.

(e) Subject to the provisions of subsections (a)-(d) of this section any Authority may, but without intending by this provision to limit any powers of such Authority, enter into and carry out such contracts or establish or comply with such rules and regulations concerning labor and materials and other related matters in connection with any project or portion thereof as the Authority deems desirable, or as may be requested by any Federal agency that may assist in the financing of such project or any part thereof. The provisions of this section shall not apply to any case in which the Authority has taken over by transfer or assignment any contract authorized to be assigned to it under the provisions of section 515 of this title, nor to any contract in connection with the construction of any project which the Authority may have had transferred to it by any person or private corporation.

§511. Use of projects

The use of the facilities of the Authority and the operation of its business shall be subject to the rules and regulations from time to time adopted by the Authority. The Authority shall not do anything which will impair the security of the holders of the obligations of the Authority, or violate any agreements with them or for their benefits.

§512. Limitation of powers

The State of Delaware hereby pledges to and agrees with any person, firm or corporation, or Federal agency subscribing to, or acquiring the bonds to be issued by the Authority for the construction, extension, improvement, or enlargement of any project or part thereof, that the State will not limit or alter the rights vested in the Authority until all bonds at any time issued, together with the interest thereon, are fully met and discharged. The State of Delaware further pledges to, and agrees with, the United States and any other Federal agency, that if any Federal agency constructs or contributes any funds for the construction, extension, improvement, or enlargement of any project, or any portion thereof, the State will not alter or limit the rights and powers of the Authority in any manner which would be inconsistent with the continued maintenance and operation of the project or the improvement thereof, or which would be inconsistent with the due performance of any agreements between the Authority and any such Federal agency, and the Authority shall continue to have and may exercise all powers granted in this chapter, so long as the same shall be necessary or desirable, for the carrying out of the purposes of this chapter, and the purposes of the United States in the construction or improvement or enlargement of the project or such portion thereof.

§513. Termination of Authority

When any Authority shall have finally paid and discharged all bonds, which, together with the interest due thereon, shall have been secured by a pledge of any of the revenues or receipts of a project, it may, subject to any agreements concerning the operation or disposition of such projects, convey such project to the city creating the Authority. When any Authority shall have finally paid and discharged all bonds issued and outstanding and the interest due thereon, and settled all other claims which may be outstanding against it, it may convey all its property to the city and terminate its existence. A certificate requesting termination of the existence of the Authority shall be filed in the office of the Secretary of State. If the certificate is approved by the city creating the Authority by its ordinance or ordinances, the Secretary shall note the termination of existence on the record of incorporation and return the certificate with his approval shown thereon to the board, which shall cause the same to be recorded in the office of the recorder of deeds of the county. Thereupon the property of the Authority shall pass to the city and the Authority shall cease to exist.

§514. Exemption from taxation; payments in lieu of taxes

The effectuation of the authorized purposes of the Authorities created under this chapter shall and will be in all respects for the benefit of the residents of incorporated cities for the increase of their commerce and prosperity, since such Authorities will be performing essential governmental functions and for the improvement of their health, safety, and living conditions, and, in effectuating such purposes, such Authorities shall not be required to pay any taxes or assessments upon any property acquired or used by them for such purposes. In lieu of such taxes or special assessments an Authority may agree to make payments to

the city or the county or any political subdivision. The bonds issued by any Authority, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation within this State.

§515. Transfer of existing facilities to Authority

(a) Any municipality or owner may sell, lease, lend, grant, or convey to any Authority any project, or any part or parts thereof, or any interest in real or personal property which may be used by the Authority in the construction, improvement, maintenance, or operation of any project. Any municipality may transfer, assign, and set over to any Authority any contracts which may have been awarded by the municipality for the construction of projects not begun, or if begun not completed. The territory being served by any project, or the territory within which such project is authorized to render service at the time of the acquisition of such project by an Authority, shall constitute the area in which such Authority shall be authorized to render service.

(b) The Authority shall first report to and advise the city by which it was created of the agreement to acquire, including all its terms and conditions.

The proposed action of the Authority, and the proposed agreement to acquire, shall be approved by the city council. Such approval shall be by two-thirds vote of all of the members of the council.

(c) This section, without reference to any other law, shall be deemed complete for the acquisition by agreement of projects as defined in this chapter located wholly within or partially without the city causing such Authority to be incorporated, any provisions of other laws to the contrary notwithstanding, and no proceedings or other action shall be required except as prescribed in this section.

APPENDIX C

Mandate

THE SUPREME COURT
OF THE STATE OF DELAWARE

To the Honorable the Chancellor of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

Civil Action No. 1029

WILLIAM H. BURTON,

Plaintiff,

—v.—

THE WILMINGTON PARKING AUTHORITY, *et al.*,

Defendants.

a certain judgment or order was entered on the 11th day of May 1959, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on January 12, 1960, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby reversed, with costs, hereby taxed in the sum of Twelve Dollars ($12.00) to be recovered by The Wilmington Parking Authority, *et al.* against William H. Burton, with right

of execution; and the said cause is hereby remanded with instructions to take such further proceedings therein as may be necessary in conformity with the opinion of this Court.

WITNESS The Honorable Clarence A. Southerland, our Chief Justice at Dover, the First day of January, A.D. 1960. Issued February 4, 1960.

/s/ T. TOWNSEND, JR.
Clerk of the Supreme Court.

COPY

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Office Supreme Court, U.S.
FILED
JUL 11 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 164

WILLIAM H. BURTON,
Plaintiff-Appellant,

v.

THE WILMINGTON PARKING AUTHORITY

and

EAGLE COFFEE SHOPPE, INC.,
Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM.

CLAIR JOHN KILLORAN,
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Wilmington, Delaware,
Counsel for Appellee,
The Wilmington Parking
Authority.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States

No. , October Term, 1959.

WILLIAM H. BURTON,
Plaintiff-Appellant.

v.

THE WILMINGTON PARKING AUTHORITY

and

EAGLE COFFEE SHOPPE, INC.,
Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM.

Appellee The Wilmington Parking Authority, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed and/or that the judgment of the Supreme Court of the State of Delaware be affirmed on the grounds that the decision below was not in favor of the validity of a Delaware statute under the Constitution, treaties or laws of the United States; and that the question presented is so unsubstantial as not to need further argument.

Statement.

This is an appeal from the judgment of the Supreme Court of the State of Delaware, reversing the declaratory judgment and injunction granted by the Court of Chancery of the State of Delaware in and for New Castle County.

Appellant was denied service, solely on account of his race, in the restaurant operated by appellee Eagle Coffee Shoppe, Inc., as lessee of a portion of a public parking facility in Wilmington, Delaware, owned and operated by appellee The Wilmington Parking Authority. Appellant brought this action in the Court of Chancery of the State of Delaware in and for New Castle County seeking declaratory and injunctive judgment requiring Appellees to furnish service to him and persons of his race in the aforesaid restaurant. The Court of Chancery granted the relief prayed, but the Supreme Court of Delaware reversed the final judgment and injunction on appeal. The facts are virtually anomalous.

Argument.

A reading of the opinion of the Supreme Court of the State of Delaware, dated January 11, 1960 (text at page 29, Appellant's Jurisdictional Statement), discloses that the same does not depend upon a determination of the validity of state statute, Title 24 Delaware Code, Section 1501 (text at page 43, Appellant's Jurisdictional Statement), under the Constitution, treaties or laws of the United States, as Appellant contends, in an effort to establish his right to appeal under the provisions of Title 28 United States Code, Section 1257(2). The aforesaid opinion depends, rather, upon a determination that Appellee Eagle Coffee Shoppe, Inc., was not an agency of the State of Delaware. This is express in the said opinion (page 42, Appellant's Jurisdictional Statement) which held as follows:

> "We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would

be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware."

Even if the said opinion is construed as a determination by innuendo or allusion that Title 24 Delaware Code, Section 1501, is valid under the Constitution of the United States, the opinion, nevertheless, rests on an adequate non-federal basis, that is, that Eagle Coffee Shoppe, Inc., is not an agency of the State of Delaware.

It is therefore respectfully submitted that the decision below was not in favor of the validity of a statute of the State of Delaware; that no substantial question for the decision of this Court is presented; and that the appeal should be dismissed and/or the judgment of the Supreme Court of the State of Delaware should be affirmed.

CLAIR JOHN KILLORAN,
Counsel for Appellee, The Wilmington Parking Authority.

July 8, 1960.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 164

WILLIAM H. BURTON,

Appellant,

—v.—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and

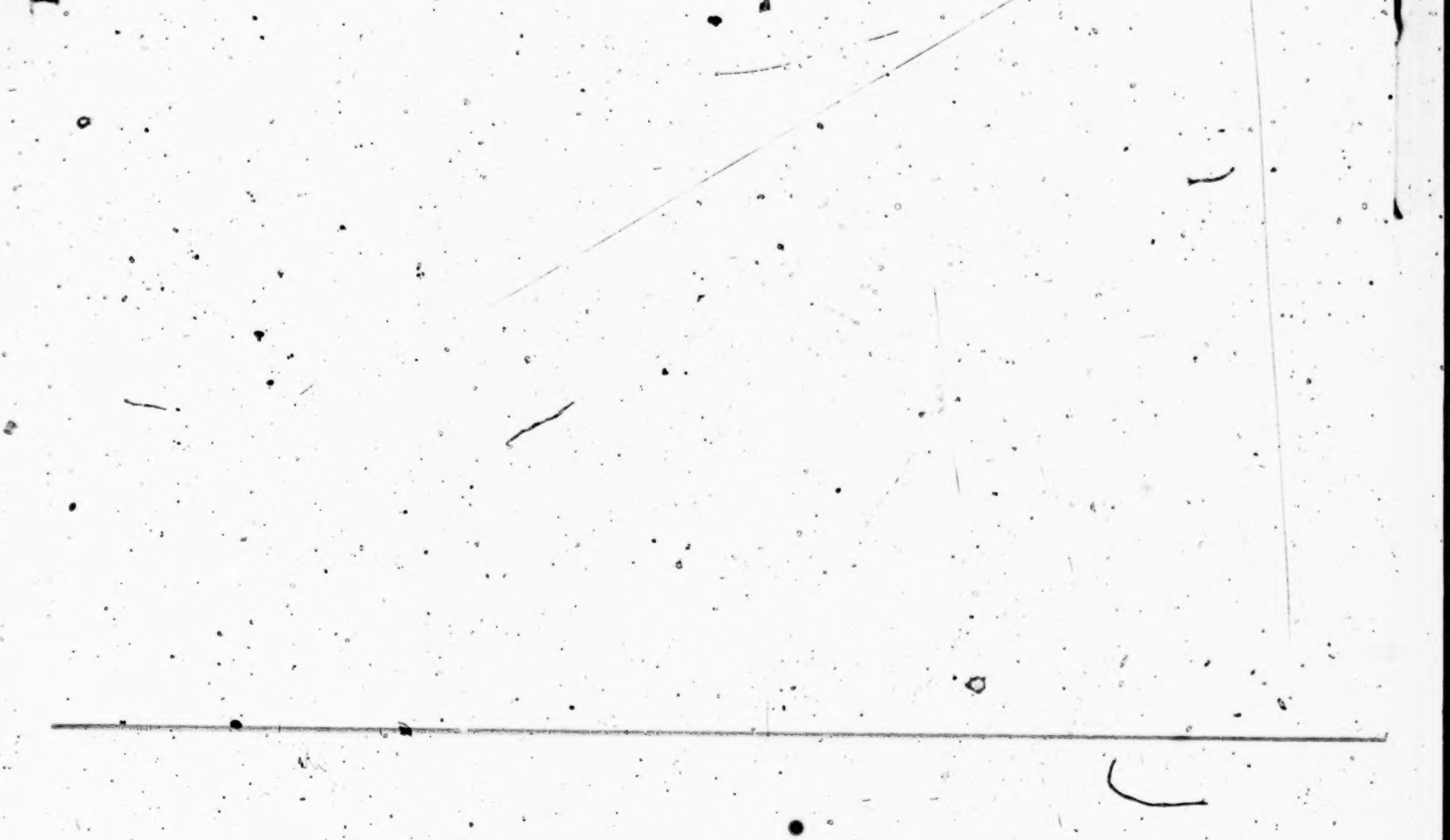
EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

APPELLANT'S BRIEF AND APPENDIX

LOUIS L. REDDING
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Counsel for Appellants



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IN THE

Supreme Court of the United States

October Term, 1960

No. 164

WILLIAM H. BURTON,

Appellant,

—v.—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

APPELLANT'S BRIEF

Opinions Below

The opinion of the Supreme Court of Delaware is reported at 157 A. 2d 894 (1960) (R. 42-54). The opinion of the Court of Chancery of the State of Delaware, in and for New Castle County, is reported at 150 A. 2d 197 (1959) (R. 36-39).

Jurisdiction

Appellant brought a class action in the Court of Chancery of the State of Delaware for a declaratory judgment and injunctive relief against Wilmington Parking Au-

thority, a public agency of the State of Delaware, and its lessee, Eagle Coffee Shoppe, Inc., a Delaware corporation, to restrain, as a denial of equal protection of the law secured by the Fourteenth Amendment, the racially discriminatory refusal of food service to him in a restaurant operated in a public parking facility maintained by the Authority in downtown Wilmington.

The judgment of the Supreme Court of Delaware, reversing the declaratory judgment and injunction granted by the Court of Chancery, was entered on January 12, 1960, and on February 4, 1960, without opinion, the Supreme Court of Delaware denied reargument. Notice of appeal to this Court was filed in the Supreme Court of Delaware on April 28, 1960, and the jurisdictional statement of appellant was filed in this Court on June 22, 1960. On October 10, 1960, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(2).

Questions Presented

1. Whether this Court has jurisdiction of the appeal.

2. Whether the court below is involved in state action repugnant to the Fourteenth Amendment when it construes a state statute, which on its face imposes no racial test, as authorizing racial discrimination in a state-owned public facility.

3. Whether the court below, by assuming facts outside the record of the case and failing to recognize the interrelationship of a public lessor of a state-owned public facility with its lessee, improperly absolves the lessor of the duty to accord equal protection of the laws.

Statutes Involved

This case involves the validity of Title 24, Delaware Code of 1953, §1501, as construed and applied in this case by the Supreme Court of Delaware to authorize racial discrimination. The text of the statute is as follows:

> §1501. Exclusion of customers; definition
>
> No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business.
>
> As used in this section, "customers" includes all who have occasion for entertainment or refreshment.

Title 22, Delaware Code of 1953, Chapter 5, also pertinent, but the validity of which is not involved, is reprinted in the Appendix, *infra*, pp. 19-45.

Statement

Appellant, a Negro, resident in Wilmington, Delaware, on August 14, 1958, parked his automobile in the public parking structure of appellee Wilmington Parking Authority (Authority) and then proceeded into a restaurant operated in the parking facility, or building. There he sought food service and was refused, solely because of his race (R. 1-3, 28-29, 37, 43).

The Authority is a public body corporate and politic, established by the City of Wilmington, pursuant to 22 Delaware Code, Ch. 5 (Appendix), to construct and oper-

ate a facility for off-street parking of automobiles. The statute declares that the purposes for which a parking authority shall exist and operate are "public" uses. The Authority has the power of eminent domain. The land on which the facility is erected, however, was acquired through negotiated purchases, the purchase money coming from three sources: revenue bonds issued on the credit of the Authority, cash donated by the City of Wilmington, and a bank loan to the Authority (R. 12). Later, the City of Wilmington gave the Authority $1,822,827.69, which was applied to redemption of revenue bonds and to repayment of the bank loan (R. 12). The structure itself was erected solely from the proceeds of the Authority's revenue bonds (R. 1-2, 5, 7, 11-13).

Section 504(a) (Appendix, p. 23) of the act under which the Authority is established provides that the Authority may lease portions of the first floor of the facility for commercial use where such leasing is necessary and feasible for the financing and operation of such a facility. The Authority is required to be financially self-sustaining. See *Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 339, 105 A. 2d 614, 622 (1954). The Authority determined that it would be feasible to erect and operate the structure only if, in addition to fees from parking, there was income from commercial leasing of space in the structure (R. 2, 5, 7, 12).

Appellee Eagle Coffee Shoppe, Inc. (Eagle) leased from the Authority certain space in the building in April, 1957, for twenty years, with an option to renew for an additional ten years (R. 2, 5, 7, 14, 26). This lease required Eagle to operate a restaurant, dining room, banquet hall, cocktail lounge and bar and to engage in no other business (R. 21). Eagle covenanted to "occupy and use the leased premises in accordance with all applicable laws . . . of any federal,

state or municipal authority" (R. 19). The Authority has the right, under the lease, to enforce its provisions in strict accordance with its terms (R. 25).

Appellant, on August 20, 1958, filed in the Court of Chancery his complaint against the Authority and Eagle, alleging that the Authority, "acting through the instrumentality of its lessee," Eagle, "using and occupying a portion of said public facility," had refused food service to appellant, solely because of his race, color and ancestry. The complaint alleged this refusal to be conduct of an agency of the State of Delaware depriving appellant of the equal protection of the laws, in violation of the Fourteenth Amendment (R. 1-4).

When the Vice Chancellor rendered the decision of the Court of Chancery, there had been filed in that court the complaint, answers by both appellees, including an admission by Eagle that appellant was refused service in the restaurant only because of his race (R. 28-29), motions for summary judgment by the Authority and Eagle, a countermotion for summary judgment by appellant, and affidavits in support of the motions. Appellees' motions set forth, in essence, two grounds as the basis for summary judgment: (1) that operation of the restaurant in the parking facility was the private business of Eagle and independent of control by the Authority; 2) that under 24 Delaware Code §1501, *supra*, Eagle was permitted to refuse service to appellant (R. 9-11).

The Vice Chancellor denied appellees' motions and granted appellant's. He concluded that because rental income was a substantial and integral part of the means of financing this "vital public facility," the Authority was obligated to enter into leases which would require the tenant to carry out the Authority's duty under the equal protection clause. He deemed the Fourteenth Amendment to ap-

ply to the operation of all aspects of the structure and to forbid racial discrimination in the restaurant. Having thus decided, the Vice Chancellor stated it was not necessary to consider appellees' reliance on 24 Delaware Code §1501 (R. 39).

The Supreme Court of Delaware, on appeal by the Authority and Eagle, was of the opinion (R. 42-54) that the only concern the Authority had with Eagle was the receipt of rent, "without which it [the Authority] would be unable to afford the public the service of off-street parking." It concluded that Eagle's discriminatory act was not that of the Authority; it deemed Eagle to be acting in a "purely private capacity." The record contained no evidence of appellant's offensiveness to other customers or of injury to business, requisites under the terms of the statute to bring it into operation, but the record did contain appellees' admission that service was refused appellant only because of his race. Conjoined with this was appellees' briefed argument that, dispensing with proof, judicial notice could be taken of the offensiveness of members of the class to which appellant belongs. In this state of the record, the court below held that 24 Delaware Code §1501 applied and authorized Eagle to refuse to serve appellant; and the court reversed the Vice Chancellor.

As the gravamen of the complaint, appellant sets up, or claims, a federal right, in that he alleges that the Authority, a public agency of the State of Delaware, acting through the instrumentality of its lessee, Eagle, in refusing appellant food service in the restaurant located in the governmentally-owned public facility, solely because of race, violated appellant's right to constitutional equal protection of the laws.

Secondly, a federal question was raised by appellant in the trial court on appellees' motions for summary judgment claiming that the statute permits refusal of service to ap-

pellant, a Negro, on the ground of race (R. 9, 10). Appellant's brief, in reply, which was the mode appropriate under Delaware practice to raise the issue, argued that:

> "[I]f the statute . . . be regarded as giving carte blanche authorization to the keeper of an inn or other place of public entertainment mentioned in the section to make discriminatory regulations based on race or color alone, this would not be private action, immune from the Fourteenth Amendment, but discriminatory state action which is barred by that Amendment."

In the Supreme Court of Delaware, the constitutional validity of the statute was again drawn into question by this appellant on appeal by the Authority and Eagle from the Vice Chancellor's decision. On that appeal, the Authority's brief made a contention based on the statute and identical with that advanced in the trial court in appellees' joint brief. Again, in the Supreme Court, appellant's brief insisted that if the statute be construed as authorizing a restaurateur to discriminate because of race, the legislation would be discriminatory state action which the Fourteenth Amendment prohibits. However, the Supreme Court of Delaware

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[1] In accordance with Delaware practice, appellees' motions were briefed and orally argued. The joint brief of the Authority and Eagle made the point, stated verbatim, that: "A Delaware innkeeper may refuse service to Negroes by reason of the provisions of 24 Delaware Code of 1953 Section 1501." This was developed to support one of the two grounds on which the Authority's motion for summary judgment was based.

[2] The Authority's brief gave recognition of the necessity under the statute of establishment of operative terms of the statute, viz., "offensive to the major part of his customers" and injury to business and argued that "no issue of fact is raised by application of Section 1501 because this Court can take judicial notice whether a member of a class is offensive to a 'major part' of Eagle's customers. The rule of judicial notice is a judicial short cut which dispenses with proof of a notorious and self-evident fact."

held the Authority not answerable for the admitted racial discrimination; and it construed and enforced the statute as authorizing exclusion of appellant because of race.

Summary of Argument

A statute of the State of Delaware relieves the proprietor of a place of public refreshment, specifically a restaurant, of obligation to receive in his place any person whose reception would be offensive to the majority of the persons having occasion to use the restaurant and would injure the business. The statute is construed by the Supreme Court of Delaware to authorize exclusion of appellant because he is a Negro without any evidence of his offensiveness to other customers or of injury to business. Appellant challenges the statute as thus construed and applied to exclude him from a restaurant operated in a state-owned public garage and the court below sustains the statute in the face of appellant's challenge. This Court has jurisdiction because the appeal draws in question the validity of the statute, the decision below being in favor of validity.

Inasmuch as the application of the statute to authorize appellant's exclusion because of race from the restaurant in the government-owned facility derives solely from the construction and enforcement given the statute by the state court below, such discriminatory construction and enforcement is state judicial action repugnant to the equal protection clause of the Fourteenth Amendment.

The court below indulged in erroneous assumptions of facts outside the record before it and from these assumptions drew the legal conclusion that there was an absence of state action in the leasing of a restaurant in a state-owned public facility. The court below also improperly

assessed the relationship between the state-agency lessor and its lessee and the responsibilities flowing from this relationship. These errors by the court below have invalidly deprived appellant of the equal protection of the laws.

ARGUMENT

I

This Court has jurisdiction of the appeal.

This case involves the question of the validity, under the Fourteenth Amendment, of a Delaware statute; Title 24, Delaware Code §1501, which, as construed and applied by the Supreme Court of Delaware to the facts of this case, authorizes the operator of a restaurant located in a public structure, conceived as a public facility by the Delaware General Assembly and constructed and maintained by a public agency of that state as a public facility, to deny service to appellant solely because he is a Negro. It is now established beyond meaningful dispute that a statute which requires or permits racial distinctions patently violates the Fourteenth Amendment. *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, *Gayle* v. *Browder*, 352 U. S. 903.

That the constitutional validity of this statute was drawn in question in this case and that the statute was sustained by the court below is inescapable in the aggregate context of the case: a suit to enjoin refusal of service to appellant because of his race; the admission of such refusal in the pleadings (R. 28-29); appellees' motions for summary judgment, pleading the statute as giving the right to refuse service to appellant (R. 9-11); the total absence in the record of facts to evidence the existence of requisites of the statute, viz., offensiveness of appellant to other customers and injury to business; appellees' briefs in support of their

motions urging judicial notice of the "notorious and self-evident fact" that appellant's being a Negro dispensed with proof of the statutory grounds for refusal of service (See fn. 2, *supra*); appellees' further contention, definitively arguing that "a Delaware innkeeper may refuse service to Negroes by reason of the provisions of" this statute (See fn. 1, *supra*); appellant's attack under the Fourteenth Amendment on the validity of the statute, given the construction and application appellees advanced; the ruling of the court below that on the basis of the statute, restaurant service to appellant could be refused.

As initiated, appellant's action was not framed in terms of a challenge to the statute, for the statute does not specifically or by implication authorize racial discrimination. Moreover, in the 83 years of its existence prior to the filing of appellant's action, there are no reported cases dealing with the statute and no discoverable record of its application. When, however, it was advanced to justify the racial discrimination of which appellant complained, his attack on its constitutional validity was clear and in a mode appropriate in the context of the case. That challenge, or attack, is the basis of this Court's jurisdiction under 28 U. S. C. §1257(2).

In the face of that challenge the court below has sustained the statute. Its ruling should not be suffered to escape review merely because it does not contain language explicitly declaring the statute impervious to constitutional attack. The reference in the opinion below to erosion of "our local law" by Federal decisions and the holding that the statute "does not compel the operator of a restaurant to give service," under the facts presented in this case, amply demonstrate the decision of the court below to uphold the statute against the attack made upon it. The issue therefore is an appropriate one for consideration under

28 U. S. C. 1257(2), because the court below has construed the state statute to authorize discrimination against appellant on the ground of his race and has upheld the statute against his constitutional attack.

In the event that this Court should determine that an appeal will not lie under 28 U. S. C. 1257(2), it is respectfully submitted that the case should be treated as an appropriate one for certiorari. *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230 (1957).

II

The judicial construction below of the statute as sanctioning racial discrimination is state action repugnant to the Fourteenth Amendment.

The statute invoked by appellees to exclude appellant, as enacted by the Delaware General Assembly, contains no racial test or standard, as clearly it could not. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880).

It may be that the statute is so vague, indefinite and uncertain in its terms that it cannot be given intelligible meaning and therefore would be inoperative. See Crawford, *The Construction of Statutes*, §198. No guidance is given by the statute as to when or how the offensiveness of a prospective patron "to the major part of his [the restaurateur's] customers" is to be ascertained. It is not indicated whether the ascertainment is to be made by a poll of, in the language of the statute, "all who have occasion for entertainment or refreshment," irrespective of whether that occasion was simultaneous with the appearance of the suspectedly offensive character or prior thereto or at some indefinite future time when the suspect is not presenting himself for service.

However, assuming that the statute as enacted is valid, appellees have not shown that they have exercised the tests it does contain.[3] With these tests unavailed of and no showing whatever made with respect to appellant's effect on the customers in the restaurant at the time of his appearance, the court below, presumably acceding to the Authority's entreaty that it take judicial notice that members of the class of persons to which appellant belongs, i.e., Negroes, are offensive, determined that the statute authorized his exclusion.

It has been held constitutionally impermissible for a court, an agency of state government, to enforce wholly private agreements plainly discriminatory on their face against Negroes, or more accurately and inclusively, all non-Caucasians, with respect to their right to acquire and occupy real property. "[J]udicial action . . . bears the clear and unmistakable imprimatur of the State," this Court said; and when by such action the state undertakes to enforce private racially discriminatory pacts preventing acquisition of real estate, Fourteenth Amendment equal protection is transgressed. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). It would seem certainly not less transgressive of that constitutional guaranty when the court below construes and enforces a statute, which on its face has no racially discriminatory provisions, to deprive appellant, because he is a Negro, of the use of real property owned and maintained by a state governmental agency.

Even if one agrees with the court below that the statute is merely a restatement of the common law (R. 54), and

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[3] In its brief in the court below, the Authority sought to excuse its failure to employ the tests thus: They "would involve the appearance of an arbitrary number of witnesses to be compelled to state their personal predilections upon a delicate and incitatory question."

we are not prepared so to agree, this Court has condemned state judicial enforcement of common law policy which nullifies constitutional freedoms. *American Federation of Labor* v. *Swing*, 312 U. S. 321 (1941), *Bridges* v. *California*, 314 U. S. 252 (1941).

III

The court below improperly absolves an agency of state government from responsibility for denial of equal protection of the laws to appellant.

That a state, in operating its facilities on a racially segregated basis, violates the constitutional guaranty of equal protection of the laws is now definitely established. *Brown* v. *Board of Education of Topeka, supra.* The court below early in its written opinion refers to this decision but in a curiously oblique understatement of the principle of the *Brown* case presignifies the departure it is to make from it. Says the opinion:

> "[T]he states and their instrumentalities have been required to act *within the scope of state action* in a racially non-segregated manner" (R. 44). (Italics supplied.)

The opinion then proceeds ultimately to the conclusion that the Authority, a state agency, in its leasing of space for a restaurant in what the trial court called a "vital public facility," is not involved in state action and that its lessee acts in a "purely private capacity" and the constitutional inhibition against racial discrimination does not apply. In arriving at this conclusion, the court below not only relies on factual information outside the record but departs from practically undeviating authority on the subject of state-owned leased real estate.

a. The court below reasons from assumptions of fact not in the record but imported from an earlier case to which this appellant was not a party.

From *Wilmington Parking Authority* v. *Ranken*, *supra*, p. 4, brought by the Authority against a taxpayer, not this appellant, to test the constitutionality of the Parking Authority Act, the court below imported facts upon which it relied for support of its determination that state action was absent in the instant case. Because the parking structure had not actually been erected, many of the cost figures used in that case were only the estimates projected by the Authority's consultants. Id. 105 A.2d at 618. On the basis of that case the court below concluded that the only "public money" used in the construction of the parking structure was "$934,000 'advanced' by the City of Wilmington and used in the purchase of a portion of the land required" (R. 50). This sum the court stated was only "approximately 15% of the total cost"; and it held that a "slight contribution is insufficient" to denote state action (R. 53).

The figure used by the court below conflicts with undisputed acknowledgment by the chairman of appellee Authority, in the record before the court below, that:

> "Subsequently the City of Wilmington gave the Authority $1,822,827.69, which sum the Authority applied to the redemption of the Revenue Bonds delivered to Diamond Ice & Coal Co. and to the repayment of the Equitable Security Trust Company loan" (R. 12).

Appellant's petition for reargument undertook to point out that the error resulting from this venturing beyond the record caused the court below to minimize what it considered the percentage of "public money" in the project. As indicated above, the petition was denied without opinion.

Whether the figure be $934,000 or $1,822,000 or, as seems more probable from the record, at least the aggregate of these sums (R. 12), what the court below regarded as the "public money," is substantial.

Moreover, it is difficult to understand that any of the funds shown by the affidavit of the Authority's chairman as coming to it (R. 12), whether cash donated by the City of Wilmington, proceeds from the sale of the Authority's revenue bonds, parking revenues or leasehold rental income, once in the treasury of this public governmental agency, are other than public funds. If public property, it cannot be used to maintain racial discrimination. *Cooper* v. *Aaron*, 358 U. S. 1 (1958). If funds constituting a trust created by an individual out of his own private fortune, in the custody of public trustees whose official position makes them agents of the state, cannot be administered in a racially discriminatory manner, *Pennsylvania* v. *Board of Directors of City Trusts*, *supra*, p. 11, then, a fortiori, the funds controlled by the Authority, however derived, cannot be used by it to work discrimination against appellant because he is a Negro.

b. The court below departs from practically unanimous authority as to the responsibility to preserve equal protection in the leasing of places of public accommodation in government-owned realty.

That a public lessor and its lessee of government-owned realty are so related as to be mutually involved in state action is the clear rationale and result of the decided cases.[4]

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[4] *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971, vacating and remanding 202 F.2d 275 (6th Cir. 1953) (leased open air theatre); *Tate* v. *Department of Conservation*, 133 F. Supp. 53 (E. D. Va. 1955), aff'd 231 F.2d 615 (4th Cir. 1956), cert. den. 352 U. S. 838 (leased beach); *City of Greensboro* v. *Simkins*, 246 F.2d 425 (4th Cir. 1957), affirming 149 F. Supp. 562 (M. D. N. C. 1957) (leased golf course); *Jones* v. *Marva Theatres Inc.*, 180

Although the court below seeks to distinguish some of these cases, they present situations closely corresponding to the instant case. In *Nash* v. *Air Terminal Services, Inc.*, 85 F. Supp. 545 (E. D. Va., 1949), a corporate restaurant concessionaire in an airport in Virginia owned by the national government, when sued for damages for refusing to serve a Negro, defended on the ground that under Virginia law, it was entitled to refuse service to the plaintiff. This contention was rejected. The court identified the private concessionaire with the "public government" owning the property on which the concession was operated, declared that the concessionaire was conducting the facility "in the place and stead of the Federal Government" and was "too close, in origin and purpose, to the functions of the public government" to be free of the inhibitions placed on government. Close identity between the governmental lessor and the private lessee exists also in the instant case and is, in fact, so close that the government facility can function only by virtue of its lessees. The power to lease portions of the first floor of the structure in the instant case is permitted to the Authority by the Parking Authority Act only if the Authority determines such leasing desirable to assist in defraying the expenses of the Authority, and here it was so determined (R. 12). The leasing was necessary to make economically feasible the operation of the parking facility as a self-sustaining governmental unit. This is admitted by the answers of both appellees (R. 5, 7). Private ownership itself has been held a mere technicality and constitutional liberties are protected on privately-owned property, if that property is operated as a municipality, i.e., a governmental entity. See *Marsh* v. *Alabama*, 326 U. S. 501 (1946).

F. Supp. 49 (D. C. Md. 1969) (leased motion picture theatre); *Coke* v. *City of Atlanta*, —— F. Supp. —— (N. D. Ga., Jan. 6, 1960) (leased restaurant); *Kern* v. *City Commissioners*, 151 Kans. 565, 100 P.2d 709 (1940) (leased swimming pool).

The decision of the court below on the question of "state action" is in conflict with the opinion in *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956). There a cafeteria in a county courthouse was held constitutionally prohibited from discriminating on the basis of race. The court held the building had been erected "with public funds for the use of the citizens generally" and that "diversion of the property to purely private use" could not be countenanced. In effect, the court coalesces the lessee with the county. Discrimination by the latter would violate the Fourteenth Amendment and the court held the "same result inevitably follows when the service is rendered through the instrumentality of a lessee." Id. at p. 925.

The court below absolved appellee Eagle from the responsibility not to discriminate on the theory that the public government did not control the restaurant. While 22 Delaware Code Ch. 5 authorizes leasing of space in a portion of the Authority's building, the General Assembly conceived that such leasing was to enable the Authority to serve a public purpose, not to divest itself of control. Indeed the court below, in the *Ranken* case, *supra*, sustained the leasing of a portion of the building only as incidental to the public uses. Its holding in the instant case that the lessee acts in a purely private capacity is certainly not consistent with a leasing incidental to public uses. Having total control, that is ownership of the fee, the Authority should have found a lessee who would have agreed to operate the restaurant consistently with the constitutional duty which the Vice Chancellor, in conformity with all of the cases, recognized was imposed on the Authority itself "not to deny to Delawareans the equal protection of the laws" (R. 39). Previous attempts by state governments at divesting themselves of the power to insist on nondiscrimination have been exposed and state responsibility enforced. See *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. denied 333 U. S. 875 (discrimination in

South Carolina primary unconstitutional although state had repealed statutory references to primary); *Terry* v. *Adams*, 345 U. S. 461; *Smith* v. *Allwright*, 321 U. S. 649. See also *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 and *Lawrence* v. *Hancock*, 77 F. Supp. 1004, which pointedly hold that a governmental agency may not in leasing a public facility relieve itself of the obligation to cause the public property to be operated without racial discrimination.

CONCLUSION

The court below has made the observation that appellant was not "discriminated against by the Authority in the operation of the public parking portion of the facility." In a single building, erected and maintained with public funds by an agency of state government to serve a public purpose, this appellant in one portion of the building serving the public can be a Delawarean whose rights are undifferentiated from other citizens and in another portion of the building, also ostensibly serving the public, is a demi-citizen without rights. This confusing irony now derives palpably from the error of the court below in construing a statute as permitting discrimination against appellant because he is a Negro and in failing to enforce the responsibility of the Authority to accord equal protection of the laws to all persons.

The judgment below should be reversed.

Respectfully submitted,

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December 27, 1960

APPENDIX

Title 22 Delaware Code, Chapter 5, Sections 501-515:

§501. Findings and declaration of policy

It is determined and declared as a matter of legislative finding that—

(1) Residential decentralization in incorporated cities has been accompanied by an ever increasing trend in the number of persons entering the business sections by private automobile as compared with other modes of transportation;

(2) The free circulation of traffic of all kinds through the streets of cities is necessary to the health, safety, and general welfare of the public whether residing in the city or traveling to, through, or from the city, in the course of lawful pursuits;

(3) The greatly increased use by the public of motor vehicles of all kinds has caused serious traffic congestion on the streets of cities;

(4) The parking of motor vehicles on the streets has contributed to this congestion to such an extent as to interfere seriously with the primary use of such streets for the movement of traffic;

(5) Such parking prevents the free circulation of traffic in, through, and from the city, impedes rapid and effective fighting of fires and the disposition of police forces in the district and endangers the health, safety, and welfare of the general public;

(6) Such parking threatens irreparable loss in valuations of property in the city which can no longer be readily reached by vehicular traffic;

(7) This parking crisis, which threatens the welfare of the community, can be reduced by providing sufficient off-street parking facilities properly located in the several residential, commercial, and industrial areas of the city;

(8) The establishment of a parking authority will promote the public safety, convenience, and welfare;

(9) It is intended that the parking authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;

therefore it is declared to be the policy of this State to promote the safety and welfare of the inhabitants thereof by the creation in incorporated cities of bodies corporate and politic to be known as "Parking Authorities" which shall exist and operate for the purposes contained in this chapter. Such purposes are declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain.

§502. Definitions

As used in this chapter, unless the context requires a different meaning—

"Authority" means a body politic and corporate created pursuant to this chapter;

"Board" means the governing body of the Authority;

"Bonds" means and includes the notes, bonds and other evidence of indebtedness, or obligations, which the Authority is authorized to issue pursuant to section 504 of this title;

"City" means incorporated city or town;

"Construction" means and includes acquisition and construction, and "to construct" means and includes to acquire and to construct, all in such manner as may be deemed desirable;

"Facility" or "facilities" means lot or lots, buildings and structures, above, at, or below the surface of the earth, including equipment, entrances, exits, fencing, and all other accessories necessary or desirable for the safety and convenience of the parking of vehicles;

"Federal agency" means and includes the United States of America, the President of the United States of America, and any department or corporation agency or instrumentality heretofore, or hereafter created, designated, or established by the United States of America;

"Improvement" means and includes extension, enlargement, and improvement, and "to improve" means and includes to extend, to enlarge, and to improve, all in such manner as may be deemed desirable.

"Municipality" means any county, incorporated city or incorporated town of this State;

"Persons" means and includes natural persons;

"Project" means any structure, facility, or undertaking which the Authority is authorized to acquire, construct, improve, maintain, or operate under the provisions of this chapter.

§503. Method of incorporation

(a) Whenever the city council or other governing body of a city desires to organize an Authority, under the provisions of this chapter, it shall adopt an ordinance signifying its intention to do so.

In the event that such ordinance sets forth the proposed articles of incorporation in full it shall not be required, any law to the contrary notwithstanding, in publishing such ordinance, under the provisions of existing law, to publish such proposed articles of incorporation in full, but it shall be sufficient compliance with such law in such publication to set forth briefly the substances of such proposed articles of incorporation and to refer to the provisions of this chapter. Thereafter the city council shall cause a notice of such ordinance to be published at least one time in a newspaper published and of general circulation in the county in which the Authority is to be organized. The notice shall contain a brief statement of the substance of the ordinance, including the substance of such articles, making reference to this chapter, and shall state that on a day certain, not less than three days after publication of the notice, articles of incorporation of the proposed Authority will be filed with the Secretary of State of this State.

(b) On or before the day specified in the notice the city council shall file with the Secretary of State articles of incorporation together with proof of publication of the notice referred to in subsection (a) of this section. The articles of incorporation shall set forth—

(1) The name of the Authority;

(2) A statement that such Authority is formed under the provisions of this chapter;

(3) The name of the city, together with the names and addresses of its council members;

(4) The names, addresses and term of office of the first members of the board of the Authority.

All of which matter shall be determined in accordance with the provisions of this chapter. The articles of incor-

poration shall be executed by the incorporating city by its proper officer and under its municipal seal.

(c) If the Secretary of State finds that the articles of incorporation conform to law he shall forthwith, but not prior to the day specified in the notice, endorse his approval thereon, and when all proper fees and charges have been paid shall file the articles and issue a certificate of incorporation to which shall be attached a copy of the approved articles. Upon the issuance of such certificate of incorporation by the Secretary of State, the corporate existence of the Authority shall begin when such certificate has been recorded in the office for the recording of deeds in the county where the principal office of the Authority is to be located. The certificate of incorporation shall be conclusive evidence of the fact that such Authority has been incorporated, but proceedings may be instituted by the State to dissolve any Authority which shall have been formed without substantial compliance with the provisions of this section.

(d) When the Authority has been organized and its officers elected, the secretary shall certify to the Secretary of State the names and addresses of its officers, as well as the principal office of the Authority. Any change in the location of the principal office shall likewise be certified to the Secretary of State within 10 days after such change.

§504. Purpose and powers

(a) The Authority, incorporated under this chapter, shall constitute a public body corporate and politic, exercising public powers of the State as an agency thereof, and shall be known as the Parking Authority of the city, but shall in no way be deemed to be an instrumentality of the city or engaged in the performance of a municipal function. The Authority shall be for the purpose of conducting the

necessary research activity, to maintain current data leading to efficient operation of off-street parking facilities, for the fulfillment of public needs in relation to parking, establishing a permanent coordinated system of parking facilities, planning, designing, locating, acquiring, holding, constructing, improving, maintaining and operating, owning, leasing, either in the capacity of lessor or lessee, land and facilities to be devoted to the parking of vehicles of any kind.

The Authority shall not have the power to directly engage in the sale of gasoline, the sale of automobile accessories, automobile repair and service or any other garage service, other than the parking of vehicles, and the Authority shall not directly engage in the sale of any commodity of trade or commerce; provided, however, that the Authority shall have the power to lease space in any of its facilities for use by the lessee for the sale of gasoline, the sale of automobile accessories, automobile repair and service or any other garage service and to lease portions of any of its garage buildings or structures for commercial use by the lessee, where, in the opinion of the Authority, such leasing is necessary and feasible for the financing and operation of such facilities. Any such lease shall be granted by the Authority to the highest and best bidder, upon terms specified by the Authority, after due public notice has been given, asking for competitive bids; provided, however, that if after such public notice no bid is received and/or the Authority rejects any bid or bids received, thereafter the Authority may negotiate any such lease or leases without further public notice but on a basis more favorable than that contained in any bid or bids rejected, if any. The phrase "due public notice," as used in this section, shall mean a notice published at least 10 days before the award of any such lease in a newspaper of general circulation

published in a municipality where the Authority has its principal office, and if no newspaper is published therein, then by publication in a newspaper of general circulation in the County where the Authority has its principal office. The Authority may reject any or all bids if, in the opinion of the Authority, any such lease granted as a result of any such bid or bids would not be adequate or feasible for the financing and operation of such facilities.

(b) Every Authority may exercise all powers necessary or convenient for the carrying out of the aforesaid purposes including, but without limiting the generality of the foregoing, the rights and powers described below.

(1) To have existence for a term of 50 years as a corporation and thereafter until the principal and interest upon all of its bonds shall have been paid or provisions made for such payment, and until all of its other obligations shall have been discharged.

(2) To sue and be sued, implead and be impleaded, complain and defend in all courts.

(3) To adopt, use and alter at will a corporate seal.

(4) To acquire, purchase, hold, lease as lessee, and use any franchise, property, real, personal, or mixed, tangible or intangible, or any interest therein, necessary or desirable for carrying out the purpose of the Authority and to sell, lease as lessor, transfer, and dispose of any property or interest therein at any time required by it.

(5) To acquire by purchase, lease or otherwise, and to construct, improve, maintain, repair, and operate projects.

(6) To make by-laws for the management and regulation of its affairs.

(7) To appoint officers, agents, employees, and servants, to prescribe their duties, and to fix their compensation.

(8) To fix, alter, charge, and collect rates and other charges for its facilities at reasonable rates to be determined exclusively by it, subject to appeal as provided in this paragraph, for the purposes of providing for the payment of the expenses of the Authority, the construction, improvement, repair, maintenance, and operation of its facilities and properties, the payment of the principal of and interest on its obligations, and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such obligations or with the city. Any person questioning the reasonableness of any rate fixed by the Authority may bring suit against the Authority in the Superior Court of the county wherein the project is located. The Superior Court shall have exclusive jurisdiction to determine the reasonableness of rates and other charges fixed, altered, charged, or collected by the Authority. Appeals may be taken to the Supreme Court within 30 days after the Superior Court has rendered a final decision.

(9) To borrow money, make and issue negotiable notes, bonds, refunding bonds, and other evidences of indebtedness or obligations of the Authority; the bonds to have a maturity date not longer than forty years from the date of issue, except that no refunding bonds shall have a maturity date longer than the life of the Authority; and to secure the payment of such bonds or any part thereof by pledge, or deed of trust of all, or any of its revenues and receipts, and to make such agreements with the purchasers or holders of such bonds, or with others in connection with any such bonds, whether issued or to be issued, as the Authority

deems advisable, and in general to provide for the security for the bonds and the rights of the holders thereof.

(10) To make contracts of every name and nature, and to execute all instruments necessary or convenient for the carrying on of its business.

(11) Without limitation of the foregoing to borrow money and accept grants from, and to enter into contracts, leases, or other transactions with, any Federal agency, State of Delaware, municipality, corporation or authority.

(12) To have the power of eminent domain.

(13) To pledge, hypothecate, or otherwise encumber all or any of the revenues or receipts of the Authority, as security for all or any of the obligations of the Authority.

(14) To do all acts and things necessary for the promotion of its business and the general welfare of the Authority to carry out the powers granted to it by this chapter or any other law.

(15) To enter into contracts with the State of Delaware, municipalities, corporations or authorities for the use of any project of the Authority and fixing the amount to be paid therefor.

(16) To enter into contracts of group insurance for the benefit of its employees, and to set up a retirement or pension fund for such employees, similar to that existing in the municipality where the principal office of the project is located.

(c) The Authority shall not at any time, or in any manner, pledge the credit or taxing power of the State of

Delaware or any political subdivision, nor shall any of its obligations be deemed to be obligations of the State of Delaware, or of any of its political subdivisions, nor shall the State of Delaware or any political subdivision thereof be liable for the payment of principal or of interest on such obligations.

(d) In addition to the provisions in this chapter provided for the financing of the costs of acquiring lands and premises and for the construction and improvement of parking projects, the Authority may by resolution, as provided in this subsection, establish a benefit district.

(1) One benefit district may be designated for the condemnation of lands for one or several parking stations. The Authority shall determine the percentage of the costs of condemnation which shall be assessable to such benefit district. Not more than 80 per cent of such costs shall be assessable to such benefit district or benefit districts.

(2) After a benefit district has been established, no further proceedings shall be taken unless there is filed with the secretary of the Authority, within sixty days of the passage of the resolution creating the benefit district, a petition requesting the establishment of such public parking station or stations. Such petition shall be signed by the resident owners of real estate owning not less than 51 per cent of the front feet of the real estate fronting or abutting upon any street included within the limits of the benefit district. In determining the sufficiency of the petition, lands owned by the city, county, State or United States or by nonresident owners of real estate within the benefit district shall not be counted in the aggregate of lands within such benefit district. After any petition has been signed by an owner of land in the benefit district, the change of ownership of the land shall not affect the petition. In any case where the owners of lands within the benefit district are tenants in

common, each co-tenant shall be considered a landowner to the extent of his undivided interest in the land. The owner of a life estate shall also be deemed a landowner for the purpose of this chapter. Guardians of minors or insane persons may petition for their wards when authorized by the proper court so to do. Resident owner of land, as defined in this paragraph, shall be any landowner residing in the city and owning land in the benefit district. No suit shall be maintained in any court to enjoin or in any way contest the establishment of such parking stations or the establishment of a benefit district unless the suit be instituted and summons served within 30 days from and after the date of the filing of such petition with the secretary of the Authority.

(3) Whenever the Authority shall have acquired lands for public parking stations and shall have declared and ordered that not more than 80 per cent of the cost of establishing or improving public parking stations, as provided in this subsection, will be paid by the levy of special assessments upon real estate situate in any one or more benefit districts, it shall cause to be made by some competent person an estimate, under oath, of the cost thereof, which estimate shall be filed with the secretary of the Authority. The assessment against the benefit district shall be apportioned among the various lots, tracts, pieces, and parcels of land within the benefit district in accordance with the special benefits accruing thereto, this apportionment of benefit assessments to be made by three disinterested property owners appointed by the mayor of the city or if such city has no mayor, by its chief executive officer within 30 days after the filing of the estimate of the cost of the improvement with the secretary of the Authority. As soon as the amount chargeable against each piece of property is ascertained, the Authority of such city shall by resolution levy such amount against this real estate in the benefit district,

which resolution shall be published once in a newspaper of general circulation in such city. No suit to question the validity of the proceedings of the Authority shall be commenced after 30 days from the awarding of a contract for such improvements and until the expiration of the 30 days the contractor shall not be required to commence work under his contract. If no suit shall be filed within such 30 days then all proceedings theretofore had shall be held to be regular, sufficient, and valid.

(4) The cost of condemnation and improvement of such public parking stations may be levied and assessed in not to exceed 10 installments, with interest on the whole amount remaining due and unpaid each year at a rate of interest not exceeding 5 per cent per annum. Any owner of land within the benefit district may, within 30 days after the assessment resolution is passed, pay the entire amount assessed against the land. The Authority of such city may assess, levy, and collect the cost of condemnation and improvement of such public parking stations as is assessed against the privately owned property in the benefit district. The assessment shall constitute a lien from the date the same is assessed by resolution, as provided in this paragraph, against the respective premises against which the same is levied, in the same manner as city taxes on real estate are constituted a lien, and shall be collectible in the manner provided for the collection of taxes assessed against the real estate of the City of Wilmington by monition process, as provided in Chapter 143, Vol. 36, Laws of Delaware.

(e) When any real property or any interest therein heretofore or hereafter acquired by the Authority is no longer needed for the purposes defined in this chapter, or when, in the opinion of the Authority it is not desirable or feasible to hold and use such property for said purposes, the Authority may sell the same at private or public sale as the

Authority shall determine, granting and conveying to the purchaser thereof a fee simple marketable title thereto. The Authority may make such sale for such price and upon such terms and conditions as the Authority deems advisable and for the best interests of the Authority and may accept in payment, wholly or partly, cash, bonds, mortgages, debentures, notes, warrants, or other evidences of indebtedness as the Authority may approve. The consideration received from any such sale may be applied by the Authority, in its discretion, to the repayment, in whole or in part, of any funds contributed to the Authority by a municipality under the provisions of section 508 of this title or retained by the Authority for the purposes of this chapter. Without limitation of the foregoing, the Authority may accept as consideration in whole or in part for the sale of any such real property, a covenant, agreement or undertaking on the part of any purchaser to provide and maintain off-street parking facilities on such property or a portion thereof for the fulfillment of public parking needs for such period and under such terms and conditions as the Authority shall determine. Any such covenant, agreement or undertaking on the part of the purchaser as aforesaid and the right of the Authority to fix and alter rates to be charged for any such parking facilities as well as the right of appeal as in this section provided, shall be set forth and reserved in the deed or deeds of conveyance. Any such covenant, agreement or undertaking may be enforced by the Authority in an action for specific performance brought in the Court of Chancery of this State. As amended 49 Del. Laws, Ch. 72, eff. May 14, 1953; 50 Del. Laws, Ch. 222, §1, eff. June 8, 1955; 50 Del. Laws, Ch. 279, §§1, 2, eff. June 13, 1955.

§505. Bonds

(a) The bonds of any Authority referred to and authorized to be issued by this chapter shall be authorized

by resolution of the board thereof, and shall be of such series; bear such date or dates; mature at such time or times not exceeding 40 years from their respective dates; bear interest at such rate or rates, not exceeding 6 per cent per annum payable semi-annually; be in such denominations; be in such form, either coupon or fully registered, without coupons; carry such registration, exchangeability, and interchangeability privileges; be payable in such medium or payment and at such place or places; be subject to such terms of redemption, not exceeding 105 per cent of the principal amount thereof; and be entitled to such priorities in the revenues or receipts of such Authority, as such resolution or resolutions may provide. The bonds shall be signed by such officers as the Authority shall determine, and coupon bonds shall have attached thereto interest coupons bearings the facsimile signature of the treasurer of the Authority, all as may be prescribed in such resolution or resolutions. Any such bonds may be issued and delivered notwithstanding that one or more of the officers signing such bonds, or the treasurer whose facsimile signature shall be upon the coupon, or any officer thereof, shall have ceased to be such officer or officers at the time when such bonds shall actually be delivered.

The bonds may be sold at public or private sale for such price or prices as the Authority shall determine. The interest cost to maturity of the money received for any issue of the bonds shall not exceed 6 per centum per annum. Pending the preparation of the definitive bonds, interim receipts may be issued to the purchaser or purchasers of such bonds and may contain such terms and conditions as the Authority may determine.

(b) Any resolution or resolutions authorizing any bonds may contain provisions which shall be part of the contract with the holders thereof as to (1) pledging the full faith

and credit of the Authority for such obligations or restricting the same to all or any of the revenues of the Authority from all or any projects or properties; (2) the construction, improvement, operation, extension, enlargement, maintenance, and repair of the project, and the duties of the Authority with reference thereto; (3) the terms and provisions of the bonds; (4) limitations on the purposes to which the proceeds of the bonds then, or thereafter to be issued, or of any loan or grant by the United States, may be applied; (5) the rate of tolls and other charges for use of the facilities of, or for the services rendered by the Authority; (6) the setting aside of reserves or sinking funds and the regulation and disposition thereof; (7) limitations on the issuance of additional bonds; (8) the terms and provisions of any deed of trust or indenture securing the bonds, or under which the same may be issued, and (9) any other additional agreements with the holders of the bonds.

(c) Any Authority may enter into any deeds of trust indentures, or other agreements, with any bank or trust company or other person or persons in the United States having power to enter into the same, including any Federal agency, as security for such bonds, and may assign and pledge all or any of the revenues or receipts of the Authority thereunder. Such deed of trust, indenture, or other agreement, may contain such provisions as may be customary in such instruments, or as the Authority may authorize, including provisions as to: (1) the construction, improvement, operation, maintenance, and repair of any project and the duties of the Authority with reference thereto; (2) the application of funds and the safeguarding of funds on hand or on deposit; (3) the rights and remedies of the trustee and holders of the bonds which may include restrictions upon the individual right of action of such bondholder, and (4) the terms and provisions of the bonds or the resolutions authorizing the issuance of the same.

(d) The bonds shall have all the qualities of negotiable instruments under the law merchant and the negotiable instruments law of the State of Delaware.

§506. Remedies of bondholders

(a) The rights and the remedies conferred upon or granted to the bondholders in this section shall be in addition to, and not in limitation of, any rights and remedies lawfully granted to such bondholders by the resolution or resolutions providing for the issuance of bonds, or by any deed of trust, indenture, or other agreement under which the same may be issued. In the event that the Authority shall default in the payment of principal of, or interest on any of the bonds, after the principal or interest shall become due, whether at maturity or upon call for redemption, and such default shall continue for a period of 30 days, or in the event that the Authority shall fail or refuse to comply with the provisions of this chapter, or shall default in any agreement made with the holders of the bonds, the holders of 25 per cent in aggregate principal amount of the bonds then outstanding by instrument or instruments filed in the office of the recorder of deeds of the county, and proved or acknowledged in the same manner as a deed to be recorded, may appoint a trustee to represent the bondholders for the purpose provided in this section.

(b) Such trustee, and any trustee under any deed of trust, indenture or other agreement, may, and upon written request of the holders of 25 per cent or such other percentages as may be specified in any deed of trust, indenture, or other agreement, in principal amount of the bonds then outstanding, shall, in his or its own name—

(1) By mandamus, or other suit, action or proceeding at law or in equity, enforce all rights of the bondholders, including the right to require the Authority to

collect rates, rentals or other charges adequate to carry out any agreement as to or pledge of the revenues or receipts of the Authority, and to require the Authority to carry out any other agreements with, or for the benefit of the bondholders, and to perform its and their duties under this chapter;

(2) Bring suit upon the bonds;

(3) By action or suit in equity require the Authority to account as if it were the trustee of an express trust for the bondholders;

(4) By action or suit in equity enjoin any acts or things which may be unlawful or in violation of the rights of the bondholders;

(5) By notice in writing to the Authority declare all bonds due and payable, and if all defaults shall be made good, then with the consent of the holders of 25 per cent or such other percentages as may be specified in any deed of trust, indenture, or other agreement, of the principal amount of the bonds then outstanding, to annul such declaration and its consequences.

(c) The Court of Chancery in and for the county wherein the Authority is located shall have jurisdiction of any suit, action or proceedings by the trustee on behalf of the bondholders. Any trustee when appointed or acting under a deed of trust, indenture, or other agreement, and whether or not all bonds have been declared due and payable, shall be entitled as of right to the appointment of a receiver, who may enter and take possession of the facilities of the Authority or any part or parts thereof, the revenues or receipts from which are, or may be, applicable to the payment of the bonds in default, and operate and maintain the same, and collect and receive all rentals and other

revenues thereafter arising therefrom, in the same manner as the Authority or the board might do, and shall deposit all such moneys in a separate account and apply the same in such manner as the court shall direct. In any suit, action or proceeding by the trustee the fees, counsel fees and expenses of the trustee, and of the receiver, if any, and all costs and disbursements allowed by the court shall be a first charge on any revenues and receipts derived from the facilities of the Authority, the revenues or receipts from which are or may be applicable to the payment of the bonds in default. The trustee shall, in addition to the foregoing, have and possess all of the powers necessary or appropriate for the exercise of any functions specifically set forth in this section, or incident to the general representation of the bondholders in the enforcement and protection of their rights.

(d) Nothing in this section, or any other section of this chapter, shall authorize any receiver appointed pursuant to this chapter for the purpose of operating and maintaining any facilities of the Authority to sell, assign, mortgage, or otherwise dispose of, any of the assets of whatever kind and character belonging to the Authority. It is the intention of this chapter to limit the powers of such receiver to the operation and maintenance of the facilities of the Authority as the court shall direct; and no holder of bonds of the Authority, nor any trustee shall ever have the right in any suit, action or proceedings at law or in equity to compel a receiver, nor shall any receiver ever be authorized, or any court be empowered to direct the receiver to sell, assign, mortgage, or otherwise dispose of, any assets of whatever kind or character belonging to the Authority.

§507. Governing body

(a) The powers of each Authority shall be exercised by a board composed of five members, all of whom shall be resi-

dents of the city creating the Authority. The mayor of the city, or if such city or town has no mayor, its chief executive officer, shall appoint the members of the board, one of whom shall serve for one year, one for two years, one for three years, one for four years, and one for five years from the first day of July in the year in which such Authority is created as provided in this chapter. Thereafter the mayor shall not sooner than 60 days, nor later than 30 days prior to July first in each year in which a vacancy occurs, appoint a member of the board for a term of five years to succeed the member whose term expires on the first day of July next succeeding. Vacancies for unexpired terms that occur more than 60 days before the end of a term shall be promptly filled by appointment by the mayor. All such appointments shall be subject to the confirmation of the city council or other governing body of the city. Any member of the board may be removed for cause by the mayor, or if such city or town has no mayor, by its chief executive officer, with the concurrence of two-thirds of all the members of the council, or other governing body of the city or town, and the person against whom such charges are made shall be given a reasonable opportunity to make his defense.

(b) Members shall hold office until their successors have been appointed and may succeed themselves. A member shall receive no compensation for his services, but shall be entitled to the necessary expenses, including traveling expenses, incurred in the discharge of his duties.

(c) The members of the board shall select from among themselves a chairman, a vice-chairman, and such other officers as the board may determine. The board may employ a secretary, an executive director, its own counsel and legal staff, and such technical experts and such other agents and employees, permanent or temporary, as it may require, and may determine the qualifications and fix the compensation

of such persons. Three members of the board shall constitute a quorum for its meetings. Members of the board shall not be liable personally on the bonds or other obligations of the Authority, and the rights of creditors shall be solely against such Authority. The board may delegate to one or more of its agents or employees such of its powers as it deems necessary to carry out the purposes of this chapter, subject always to the supervision and control of the board. The board shall have full authority to manage the properties and business of the Authority and to prescribe, amend, and repeal by-laws, rules and regulations governing the manner in which the business of the Authority may be conducted, and the powers granted to it may be exercised and embodied.

§508. Acquisition of lands; cost financing by municipality

* * * * *

The Authority may acquire by purchase or eminent domain proceedings either the fee or such rights, title, interest, or easement in such lands, as the Authority deems necessary for any of the purposes mentioned in this chapter. No property devoted to a public use, nor any property of a public service company, property used for burial purposes, places of public worship, nor property which on June 21, 1951 was used as a facility or facilities for the parking of motor vehicles, so long as the property is continuously so used, and so long as the operation of the facility complies with parking and traffic ordinances of the city shall be taken under the right of eminent domain. The right of eminent domain shall be exercised by the Authority in the manner provided by chapter 61 of Title 10.

The right of eminent domain conferred by this section may be exercised only within the city.

Court proceedings necessary to acquire property or property rights, for purposes of this chapter, shall take prece-

dence over all causes not involving the public interest in all courts to the end that the provision of parking facilities be expedited.

Any municipality establishing an Authority under this chapter may, under such terms and conditions as it may deem appropriate, provide for and pay to such Authority such sum or sums of money necessary to acquire in whole or in part the lands upon which such Authority may undertake to erect a parking facility as herein provided and/or such sum or sums of money necessary to construct in whole or in part a parking facility or facilities as herein provided; the municipality for the purpose of providing said money may issue its general obligation bonds secured by the faith and credit of the municipality. The aggregate amount of general obligation bonds issued by a municipality under this provision shall be in addition to and not within the limitations of any existing statutory debt limitation of the municipality. As amended 49 Del. Laws, Ch. 2, eff. June 4, 1953; 50 Del. Laws, Ch. 221, §1, eff. June 8, 1955.

§509. Moneys; examination of accounts

All moneys of any Authority, from whatever source derived, shall be paid to the treasurer of the Authority. The moneys shall be deposited, in the first instance by the treasurer in one or more banks or trust companies, in one or more special accounts. The moneys in the accounts shall be paid out on the warrant or other order of the chairman of the Authority, or of such other person or persons as the Authority may authorize to execute such warrants or orders. Every Authority shall have at least an annual examination of its books, accounts and records by a certified public accountant. A copy of such audit shall be delivered to the city creating the Authority. A concise financial statement shall be published annually at least once in a newspaper of general circulation in the city where the prin-

cipal office of the Authority is located. If such publication is not made by the Authority the city shall publish such statement at the expense of the Authority. If the Authority fails to make such an audit then the auditor or accountant designated by the city may, from time to time, examine at the expense of the Authority, the accounts and books of the Authority, including its receipts, disbursements, contracts, leases, sinking funds, investments, and any other matters relating to its finances, operation, and affairs.

The Attorney General of the State may examine the books, accounts and records of any Authority.

§510. Competition in award of contracts

(a) All construction, reconstruction, repairs, or work of any nature made by any Authority, where the entire cost, value, or amount of such construction, reconstruction, repairs, or work including labor and materials, shall exceed $500, except reconstruction, repairs, or work done by employees of the Authority, or by labor supplied under agreement with any Federal or State agency with supplies and materials purchased as provided in this section, shall be done only under contract or contracts to be entered into by the Authority with the lowest and best bidder, upon proper terms, after due public notice has been given, asking for competitive bids as provided in this section. No contract shall be entered into for construction or improvement or repair of any project, or portion thereof, unless the contractor shall give an undertaking with a sufficient surety or sureties, approved by the Authority, and in an amount fixed by the Authority for the faithful performance of the contract. All such contracts shall provide, among other things, that the person or corporation entering into such contract with the Authority will pay for all materials furnished and services rendered for the performance of the contract, and that any person or corpo-

ration furnishing such materials or rendering such services may maintain an action to recover for the same against the obligor in the undertaking, as though such person or corporation was named therein, provided the action is brought within one year after the time the cause of action accrued. Nothing in this section shall be construed to limit the power of the Authority to construct, repair, or improve any project or portion thereof, or any addition, betterment, or extension thereto directed by the officers, agents, and employees of the Authority or otherwise than by contract.

(b) All supplies and materials costing $500 or more shall be purchased only after due advertisement as provided in this section. The Authority shall accept the lowest bid or bids, kind, quality, and material being equal, but the Authority may reject any or all bids or select a single item from any bid. The provisions as to bidding shall not apply to the purchase of patented and manufactured products offered for sale in a noncompetitive market, or solely by a manufacturer's authorized dealer.

(c) The terms, advertisement or due public notice, wherever used in this section shall mean a notice published at least 10 days before the award of any contract in a newspaper of general circulation published in a municipality where the Authority has its principal office, and if no newspaper is published therein, then by publication in a newspaper of general circulation in the county where the Authority has its principal office.

(d) No member of the Authority or officer or employee thereof shall either directly or indirectly be a party to, or be in any manner interested in, any contract or agreement with the Authority for any matter, cause, or thing whatsoever by reason whereof any liability or indebtedness shall in any way be created against such Authority. If any contract or agreement shall be made in violation of the

provisions of this section the same shall be null and void and no action shall be maintained thereon against such Authority.

(e) Subject to the provisions of subsections (a)-(d) of this section any Authority may, but without intending by this provision to limit any powers of such Authority, enter into and carry out such contracts or establish or comply with such rules and regulations concerning labor and materials and other related matters in connection with any project or portion thereof as the Authority deems desirable, or as may be requested by any Federal agency that may assist in the financing of such project or any part thereof. The provisions of this section shall not apply to any case in which the Authority has taken over by transfer or assignment any contract authorized to be assigned to it under the provisions of section 515 of this title, nor to any contract in connection with the construction of any project which the Authority may have had transferred to it by any person or private corporation.

§511. Use of projects

The use of the facilities of the Authority and the operation of its business shall be subject to the rules and regulations from time to time adopted by the Authority. The Authority shall not do anything which will impair the security of the holders of the obligations of the Authority, or violate any agreements with them or for their benefits.

§512. Limitation of powers

The State of Delaware hereby pledges to and agrees with any person, firm or corporation, or Federal agency subscribing to, or acquiring the bonds to be issued by the Authority for the construction, extension, improvement, or enlargement of any project or part thereof, that the State

will not limit or alter the rights vested in the Authority until all bonds at any time issued, together with the interest thereon, are fully met and discharged. The State of Delaware further pledges to, and agrees with, the United States and any other Federal agency, that if any Federal agency constructs or contributes any funds for the construction, extension, improvement, or enlargement of any project, or any portion thereof, the State will not alter or limit the rights and powers of the Authority in any manner which would be inconsistent with the continued maintenance and operation of the project or the improvement thereof, or which would be inconsistent with the due performance of any agreements between the Authority and any such Federal agency, and the Authority shall continue to have and may exercise all powers granted in this chapter, so long as the same shall be necessary or desirable, for the carrying out of the purposes of this chapter, and the purposes of the United States, in the construction or improvement or enlargement of the project or such portion thereof.

§513. Termination of Authority

When any Authority shall have finally paid and discharged all bonds, which, together with the interest due thereon, shall have been secured by a pledge of any of the revenues or receipts of a project, it may, subject to any agreements concerning the operation or disposition of such projects, convey such project to the city creating the Authority. When any Authority shall have finally paid and discharged all bonds issued and outstanding and the interest due thereon, and settled all other claims which may be outstanding against it, it may convey all its property to the city and terminate its existence. A certificate requesting termination of the existence of the Authority shall be filed in the office of the Secretary of State. If the certificate is approved by the city creating the Authority by

its ordinance or ordinances, the Secretary shall note the termination of existence on the record of incorporation and return the certificate with his approval shown thereon, to the board, which shall cause the same to be recorded in the office of the recorder of deeds of the county. Thereupon the property of the Authority shall pass to the city and the Authority shall cease to exist.

§514. Exemption from taxation; payments in lieu of taxes

The effectuation of the authorized purposes of the Authorities created under this chapter shall and will be in all respects for the benefit of the residents of incorporated cities for the increase of their commerce and prosperity, since such Authorities will be performing essential governmental functions and for the improvement of their health, safety, and living conditions, and, in effectuating such purposes, such Authorities shall not be required to pay any taxes or assessments upon any property acquired or used by them for such purposes. In lieu of such taxes or special assessments an Authority may agree to make payments to the city or the county or any political subdivision. The bonds issued by any Authority, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all time be free from taxation within this State.

§515. Transfer of existing facilities to Authority

(a) Any municipality or owner may sell, lease, lend, grant, or convey to any Authority any project, or any part or parts thereof, or any interest in real or personal property which may be used by the Authority in the construction, improvement, maintenance, or operation of any project. Any municipality may transfer, assign, and set

over to any Authority any contracts which may have been awarded by the municipality for the construction of projects not begun, or if begun not completed. The territory being served by any project, or the territory within which such project is authorized to render service at the time of the acquisition of such project by an Authority, shall constitute the area in which such Authority shall be authorized to render service.

(b) The Authority shall first report to and advise the city by which it was created of the agreement to acquire, including all its terms and conditions.

The proposed action of the Authority, and the proposed agreement to acquire, shall be approved by the city council. Such approval shall be by two-thirds vote of all of the members of the council.

(c) This section, without reference to any other law, shall be deemed complete for the acquisition by agreement of projects as defined in this chapter located wholly within or partially without the city causing such Authority to be incorporated, any provisions of other laws to the contrary notwithstanding, and no proceedings or other action shall be required except as prescribed in this section.

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Office Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 164.

WILLIAM H. BURTON,

Petitioner,

v.

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware,

and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Respondents.

On Certiorari From the Supreme Court of the State of Delaware.

BRIEF OF RESPONDENT, EAGLE COFFEE SHOPPE, INC.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 164.

WILLIAM H. BURTON,

Petitioner,

v.

THE WILMINGTON PARKING AUTHORITY, A BODY CORPORATE AND POLITIC OF THE STATE OF DELAWARE

AND

EAGLE COFFEE SHOPPE, INC., A CORPORATION OF THE STATE OF DELAWARE,

Respondents.

ON CERTIORARI FROM THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF OF RESPONDENT, EAGLE COFFEE SHOPPE, INC.

QUESTIONS OF LAW.

The only questions of law that should be considered, it is respectfully submitted, are the following:

1. Should this Court take jurisdiction of the appeal?

2. Has there been a violation of the equal protection clause of the Fourteenth Amendment when the facts are as follows: The Wilmington Parking Authority, a state agency, has acquired certain property by condemnation, pursuant to a statute which authorizes use of a portion of the property for public parking, and rental of the remaining portion to the highest bidders for the purpose of obtaining adequate funds with which to operate the parking facility. The right to rent the extra space for this purpose was approved by a decision of the Supreme Court of Delaware. The respondent, Eagle Coffee Shoppe, Inc., the successful bidder for one of the extra spaces, operates a restaurant therein. It has been the policy of the respondent to refuse restaurant service to Negroes. Specifically, respondent refused to serve the petitioner because he is a Negro.

It will be observed that the first question above is similar to the first question posed by petitioner in his brief. The second corresponds to petitioner's third except that respondent's version is more specific and that respondent omits reference to the matter of "assuming facts outside the record of the case." Although petitioner has inserted these quoted words in his third question, nowhere in his brief has he cited a single authority for the proposition that a court may not refer to relevant facts in a prior case decided by it. A court has wide discretion in seeking the truth, which privilege, of course, can not be abused. Petitioner has attacked the accuracy of the findings of facts outside the record, which he has a right to do, but in the absence of his

supporting with authorities the impropriety of the Court's going "out of the record", respondent is not called upon to make an extensive defense of that procedure.

Respondent has omitted entirely from its list of issues any question similar to petitioner's Question No. 2, which concerns the legality of a state statute. Respondent contends that this question should not be considered for reasons which will be given in answering the first question here propounded: Should this Court take jurisdiction of the appeal. Since an appeal must be confined to a consideration of the very statute referred to by petitioner in his Question No. 2, the answer of respondent to its first question of law, that this Court should not take jurisdiction of the appeal, gives the reasons why petitioner's second question should be held irrelevant to a solution of the problem to be resolved.

STATEMENT OF THE CASE.

Respondent relies upon the "Statement of the Case" made by his co-respondent, The Wilmington Parking Authority, upon the "facts" presented in petitioner's "Statement", and upon the findings of fact in the Opinion of the Supreme Court of Delaware (R. 42 et seq.).

SUMMARY OF ARGUMENT.

This case was brought by petitioner to this Court on appeal from the decision of the Supreme Court of Delaware. By rule of this Court, the only question that could have been considered on appeal was the legality of a statute which respondents had offered as a secondary defense to the complaint in the Delaware Court of Chancery. Petitioner having requested that the appeal be considered in the alternative as an application for certiorari, this Court made a ruling the effect of which was to accept jurisdiction of the certiorari application, and to postpone consideration of

jurisdiction of the appeal to the hearing on the merits in the certiorari proceedings.

Respondent requests the Court not to take jurisdiction of the appeal because interpretation of the statute can not possibly have any bearing on the final decision, which must depend on determination of the primary issue, whether a lessee of a state agency, leasing property which at the time of the creation of the agency was dedicated not for use in performing the function of the agency, parking service, but for the special purpose of obtaining the maximum amount of money from the highest bidder, who conducts its business in a racially discriminatory manner, violates the equal protection clause of the Fourteenth Amendment. Interpretation of the statute, furthermore, requires solution of a very difficult problem, whether the judicial enforcement doctrine of *Shelley v. Kraemer*[1] encompasses a court's acceptance of a pleading by way of defense.

The sole question, posed above, to be heard on the merits, should be decided in favor of respondents. The factual context of the present case makes it different from all those cited in petitioner's brief and brings it within the orbit of the surplus property cases, the "blighted area" cases and the other cases and hypothetical situations recited in respondent's brief. It is "in the public interest" that the Parking Authority be able to obtain the largest amount of money from the leasing of this extra space. That can be accomplished only if there is no federal interference with the operation of the business by the private enterprise in any manner it sees fit. Preservation of the constitutional guaranty of federal non-interference with private enterprise under the present circumstances, despite the momentary injustice of racial discrimination, will result in the long run in a greater measure of equal protection of the laws.

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1. 334 U. S. 1; 68 S. Ct. 836; 92 L. Ed. 1161 (1948).

ARGUMENT.

I. This Court Should Not Take Jurisdiction of the Appeal.

Petitioner brought this case here solely on appeal, and had the matter remained so, the only issue before this Court, under its rules, would have been the correctness of the Delaware Court's interpretation of Title 24, Delaware Code of 1953, Sec. 1501. After respondents requested this Court not to take jurisdiction of the appeal, petitioner countered with the contention that since an important constitutional question was involved and since the Delaware Court's decision was allegedly repugnant to prior decisions of this Court, it should, in the alternative, grant certiorari. On October 10, 1960, this Court entered an order which reads:

> "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."

Respondent assumes that the effect of the Order is twofold: first, that the Court has agreed to hear the merits of the case upon its facts under the certiorari application and second, that upon the hearing on the merits, the Court will also entertain arguments pertaining to the question whether it should take jurisdiction to consider on appeal the legality of the statute.

Since under its rules this Court may grant certiorari under certain circumstances even where the pleader did not request certiorari but merely appealed, respondent can see no ground available to it for disputing the Court's right to try the cause upon certiorari. As to the appeal, however, respondent is on better footing when it argues against review of the Delaware Court's interpretation of the statute on the following grounds:

After petitioner here, plaintiff in the action in the Court of Chancery, filed his complaint in Chancery, respondents

here, the defendants below, in their answers (R. 5, 7) referred to the statute by way of defense separate and apart from their main defense. The Court of Chancery deemed it unnecessary to interpret the statute, basing its final decision solely on the question whether racially discriminatory action under the auspices of a state agency under the instant facts violated the Fourteenth Amendment. In their brief in Chancery, respondents paid almost no attention to the effect of the statute. When appeal was taken to the Supreme Court of Delaware, respondents again devoted a very small portion of their brief to the statute. In the lengthy opinion of the Supreme Court of Delaware, only two or three sentences at the very end are devoted to a discussion of the statute. Why was so little study given to the statute? Because respondents as well as the two Delaware Courts realized that interpretation of the statute was a relatively unimportant matter, and need not even have been considered in determining the rights of the parties.

The defense based on the statute can not in fact control the outcome of the case. If it is held that the Eagle Restaurant's discriminatory conduct did violate the Fourteenth Amendment, it makes no difference what rights are granted to the restaurant under the statute or the common law, for the state law, under principles of sovereignty, must yield to the federal law. If it is, however, held that the respondents' first defense is valid, namely that there has been no violation of federal law and that respondent has a common law right to discriminate, it makes no difference whether the statute is constitutional or not, or whether the acts of the restaurant were justified under the statute. It is fundamental that when a defendant in a civil action pleads several defenses, and it is found that one of the defenses which is paramount to the others and is relied on as indispensable is a good defense and all the other collateral defenses are stricken out as invalid, judgment is rendered in favor of the defendant on the good defense.

It is true that the legality of the statute was made an issue when it was presented as a separate defense and was challenged. But since this is an issue the determination of which can not be decisive of the rights of either party, why should the Court undertake to decide it merely as an academic problem?

Furthermore, the problem of interpreting the availability of such defense under the statute is a much more difficult one than would appear from the treatment of the subject given in petitioner's brief. At page 12, petitioner's brief reads:

> "Even if one agrees with the court below that the statute is merely a restatement of common law (R-54) and we are not prepared so to agree, this Court has condemned state judicial enforcement of common law policy which nullifies constitutional freedoms. American Federation of Labor v. Swing, 312 U. S. 321 (1941); Bridges v. California, 314 U. S. 252 (1941)."

An examination of these two cases cited by petitioner discloses that each involved a conflict between the constitutional right to exercise free speech and a state common law right. In the first, the common law right was the right to freedom from a certain type of picketing. In the second, the local right was that of a state court not to be subjected to contempt in comment by a newspaper. In each case, the holding was that the right of free speech was paramount to these local rights. It is noteworthy that the right of free speech is a prerogative granted to all persons. In our case the privilege of freedom from racial discrimination is limited only to those operating within the orbit of state activity. Thus, before there can be found any conflict between the local law and the federal law in our case, it must first be held that "state action" is involved. These two cases do not concern *judicial enforcement* of a common law right in any sense which has any meaning here. They merely involve judicial determination as to which law takes

precedence, the local or the constitutional. Our case involves no such conflict. Respondents and the Supreme Court of Delaware have never maintained that local common law may supersede constitutional law. What is maintained is that there has been no violation of constitutional law.

Judicial enforcement of a state or local law, as defined in *Shelley v. Kraemer*,[1a] would have a bearing on the question of the legality of the Delaware statute if an appeal is allowed in this case. But the *Shelley v. Kraemer* doctrine, according to later decisions, has received certain judicial limitations. In *Rice v. Sioux City Memorial Park Cemetery*,[2] in a suit to enforce a contract of interment, it was pleaded *as a defense* to a civil suit that the contract contained a covenant against burial of non-Caucasians. The Supreme Court of Iowa held that the *judicial enforcement* doctrine of the *Shelley* case did not operate to bar a *defense* based on a restrictive covenant. When the matter was presented to this Court for decision,[3] the Court membership divided equally, with the result that the judgment below was affirmed. When it was discovered that the Iowa legislature had enacted a statute prohibiting cemetery companies from imposing such restrictions, a petition for a rehearing of the cause was filed and the Court vacated the affirmation of the holding resulting from the split decision.[4] In vacating the judgment, the Court made the following remark as to the attempted extension of the *Shelley v. Kraemer* doctrine: "This is a complicated problem which for long has divided opinion in this Court."

But in *Charlotte v. Barringer*,[5] in which a declaratory judgment action was instituted to determine the validity of a restrictive covenant against the use of a park by Negroes,

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1a. See note 1, *supra*.

2. 245 Iowa R. 147, 60 N. W. 2d 110 (1953).

3. 347 U. S. 942, 74 S. Ct. 638, 98 L. Ed. 1091 (1954).

4. 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1954).

5. 242 N. C. 311, 88 S. E. 2d 114 (1955).

with a reverter to the grantor if the covenant were violated, it was held that the Court in deciding in favor of the validity of this covenant was not engaged in *judicial enforcement* of a restrictive covenant. Certiorari was asked of this Court and denied.[6]

The facts here are similar to those in the *Rice* case and are not similar to those in the *Shelley* case, for here it is only by way of defense that the validity of the statutory authorization to discriminate comes into issue. Did the *Charlotte* case, *supra,* reinstate the holding in the original *Rice* case resulting from the split decision, or is the question still an open one whether a court in entertaining and giving legal effect to a defense is engaged in judicial enforcement of that defense?

In view of the comment made by the Court in vacating the effect of its split decision in the *Rice* case, will it now undertake to decide this difficult problem, resolution of which does not even affect the rights of the parties? In actuality, respondent rests its right to discriminate against Negroes not on the statute, nor on whether recognition of a defense based on the statute constitutes judicial enforcement of the statute, but on whether the common law right of every private business, including a restaurant, to operate as it sees fit should be held subject to the Fourteenth Amendment where the business has such ties with a public agency as exist here. The burden of the argument which follows will be that under the circumstances in the instant case, this Court, in view of its rulings in analogous cases, should hold that the equal protection clause is not applicable.

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6. 350 U. S. 983, 76 S. Ct. 469, 100 L. Ed. 851 in *Leeper v. Charlotte Park* (1956).

II. In Respect to Racially Discriminatory Acts by State Agencies, or by Parties in Some Way Associated With Such Agencies, This Court Has Made Variant Decisions Depending Upon the Facts, as to Whether There Has Been Any Violation of the Equal Protection Clause of the Fourteenth Amendment.

Petitioner's brief requests a ruling in his favor on the basis of a number of cases cited by him wherein this Court has ruled that racially discriminatory action by certain lessees of state agencies violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution. In these and in other cases on the subject, the definition of "state action" is given in such broad terms that if the definitions were applied uniformly it would be impossible for any private business to escape classification as a state activity. Some of these definitions are collected by Judge Fuld in his dissenting opinion in *Dorsey v. Stuyvesant Corporation*.[7] Typical is that in *Shelley v. Kraemer*,[8] wherein it is said that state action refers to "the exertion of state power in all forms." Despite Judge Fuld's remonstrance that the facts in the *Dorsey* case clearly exhibited the exertion of state power, a majority of the state court refused to hold that the discrimination recorded there violated the Fourteenth Amendment. This Court denied certiorari in that case.[9]

In the *Dorsey* case, *supra*, a private redevelopment corporation had discriminated in its rental policies as to Negroes. The land on which the housing development was built had been taken in condemnation by the City of New York under a special statute, and then had been resold to the private company for this specific redevelopment project. It was sold subject to state control of the rental charges, of

7. 299 N. Y. 512, 87 N. E. 2d 541 (1949).

8. See Note 1, *supra*.

9. Cert. den. in 339 U. S. 981, 70 S. Ct. 1019; 94 L. Ed. 1385 (1950).

the profits of the company, of the methods of financing, and free from taxation. Yet these facts were held not to bring the Fourteenth Amendment into operation.

Even under the definition of state action later expounded in *Cooper v. Aaron*,[10] to the effect that state action refers to support by the state "through any arrangement, management funds or property," the activity of the private company in the *Dorsey* case would have to be classified as state activity. We can conclude only that there must be some factor so strong and important that it either creates an exception to the broad definitions of state action or makes these generalized definitions too broad to use as a test to determine what is or is not state activity.

A more fundamental problem implicit in the *Dorsey* case has been considered by this Court, namely the question whether state action in the form of condemnation of private property in a "blighted area" and resale of the condemned property to private interests constitutes in itself unequal protection of the laws. For it can not be denied that those persons of small means who are dispossessed by the condemnation, among whom there undoubtedly are many Negroes, will suffer as a result of this state action, whereas persons of affluence, usually the whites, who will be able to buy these properties for private use and profit will benefit. Yet the right of the state and of the private beneficiaries to engage in these practices has been sustained in *Berman v. Parker*.[11]

There was both the "exertion of state power" and state support by the contribution of funds under the facts in *Eaton v. Board of Managers*,[12] yet the federal court held that there was no "state action" within the meaning of the Fourteenth

10. 358 U. S. 1, 19; 78 S. Ct. 1401, 1410, 3 L. Ed. 2d 3 (1958).

11. 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954). Also see *Murray v. LaGuardia*, 291 N. Y. 320; 52 N. E. 2d 884, cert. den., in 324 U. S. 771; 64 S. Ct. 530; 88 L. Ed. 1066 (1944) to same effect.

12. *Eaton v. Board of Managers*, 164 F. Supp. 191 (1958), 261 F. 2d 521; cert. denied in 359 U. S. 984, 79 S. Ct. 941, 3 L. Ed. 2d 934 (1959).

Amendment. In that case, three Negro doctors brought suit to obtain their admission to the staff of a private hospital from which they had been excluded because of their color. The hospital had been built on land one-half of which had been purchased from the state, the state had made contributions for the upkeep of the hospital, and there was provision for reverter to the state as to one-half of the hospital's land should the operation of the hospital cease.

An indication that even a lease agreement between a state agency and a private party does not necessarily subject the latter to the operation of the Fourteenth Amendment is found in *Derrington v. Plummer*,[13] which involved the leasing of the basement of a county court house to a private person for the operation of a cafeteria. The proprietor of the cafeteria had refused to sell food to Negroes. In holding that such discrimination offended the Fourteenth Amendment, the Federal Circuit Court, however, made these remarks:[14]

> "No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. *Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person.*" (Italics supplied.)

And in the next paragraph after the above statement, that Court, upon an examination of the facts, concluded that "the basement of the court house can by no means be termed surplus property not used nor needed for county purposes."

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13. 148 F. Supp. 326; 240 F. 2d 922; cert. den. in 353 U. S. 924; 77 S. Ct. 680; 1 L. Ed. 2d 720 (1957) as *Casey v. Plummer*.

14. 240 F. 2d 922, 925, (1956).

The Circuit Court may have based this distinction between property needed for governmental purposes and property not needed for governmental purposes on the opinion of the United States Supreme Court in *Ashwander v. Tennessee Valley Authority*.[15] Ruling that the Tennessee Valley Authority could dispose of surplus power to private persons for strictly private uses, the Supreme Court quoted with approval these words:[16]

> "If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the government. The practice is not unusual in respect to similar public works constructed by state governments."

And in the *Ashwander* opinion, discussing whether the disposal of surplus property is limited to some public use, the Court declared that there was no such limitation upon the use of the property. Apparently, not only could the government lease or otherwise dispose of surplus public property to private interests, but the private persons could treat and use that surplus property in any manner they saw fit.

It has been held that no discriminatory state action was involved in the removal of the Board of City Trusts as trustee of a private trust, so as to permit a substituted private trustee to carry out the terms of a trust establishing a college for white males only.[17]

When the state grants a charter or a municipality a license to anyone to engage in any private business, there is definitely an exertion of state power. In three cases, it was decided that the grant of a license did not make the licensee

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15. 297 U. S. 288; 56 S. Ct. 466; 80 L. Ed. 688 (1936).

16. *Idem*, page 335 of 297 U. S., page 477 of 56 S. Ct.

17. *Re, Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844, cert. den. in 357 U. S. 570, 78 S. Ct. 1383, 2 L. Ed. 2d 1546 (1958).

an agent, or representative of the state within the orbit of the term "state action." [18]

Inns, railroads, theaters, privately owned public utilities, quasi-public enterprises of all kinds, and all businesses so affected with a public interest as to be subject to public control are nevertheless immune from the provisions of the Fourteenth Amendment according to the *Civil Rights Cases*, from which there has been no deviation to this date.[19]

Public assistance in the form of providing water and sewerage facilities was held by the Maryland Federal District Court [20] not sufficient to convert a private real estate concern into a state agency.

If a state agency, such as the parking authority in our case, contracts with a private firm of auditors to have the parking authority's books audited, and much of the work is done on the premises of the parking authority, would the equal protection clause bar the auditing firm from discriminating in its employment policies or in any other aspect of its business against any racial group?

If a plumbing or electrical concern is engaged by the parking authority or by any other state agency to do work upon the agency's property, does the Fourteenth Amendment immediately come into effect so that the plumbing and electrical firms may not practice racial discrimination as to any work done on the premises?

Private banks in Delaware, and probably elsewhere, have discriminatory practices as to whom they select for their board of directors, or for their counsel, as to whom they employ in responsible positions, as to the race and color of those to whom they extend credit. We deplore and condemn these prejudices and these discriminatory policies.

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18. *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. 2d 697, cert. den. in 332 U. S. 761, 68 S. Ct. 63, 82 L. Ed. 346 (1947); *Slack v. Atlantic White Tower*, 181 F. Supp. 124 (1960); *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (1959).

19. 109 U. S. 3; 3 S. Ct. 18; 27 L. Ed. 835 (1883).

20. *Hackley v. Art Builders, Inc.*, 179 F. Supp. 851 (1960).

This Court could help to end these injustices by deciding that such policies come within the ban of the Fourteenth Amendment because the state supports these institutions by borrowing money from them and by depositing savings with them. But then what of the principle announced in the *Civil Rights Cases* [21] that the Federal Government does not have the power to enforce the Fourteenth Amendment against private enterprises, a principle which has been consistently adhered to to this day. As stated by the Iowa Supreme Court in the *Rice* case,[22] *supra:*

> "But there is danger in attempting a remedy by such constitutional expansion. Invocation of the constitution then might depend upon a balance of two asserted values —the privilege of the private corporation v. the right of the plaintiff to equality of treatment which is another well known constitutional safeguard. It must be clear that a clash would result between such expansion of the 14th Amendment and the decisions of long standing in the Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835. Both demand that the states protect the rights defined in the amendment against the wrongful actions of private individuals. This most states do by appropriate legislation and it is just and proper that state authorities furnish appropriate means of extending these moral rights into areas when they have not heretofore been asserted, rather than to try an extension of the coverage of the 14th amendment to fields that will abridge other individual rights, and violate other constitutional guarantees."

The foregoing cases and these hypothetical situations have been presented to demonstrate either that the general definitions of "state action" miss their mark, that there may be exceptions to the general rule as to discriminatory policies

21. See note 19, *supra.*
22. See note 2, *supra.*

by state agencies under certain circumstances, or that there is some other reason why the rule does not apply. They show that there is no magic in any arrangement between a state agency and a private business which automatically, arbitrarily and without any consideration of the reason and purpose underlying the arrangement, converts the private business into an arm of the state within the meaning of the Fourteenth Amendment.

In a recent survey of racial problems,[23] very sympathetic to the Negroes, a comprehensive review of the many cases on the subject of discriminatory activities under state auspices[24] concludes that, "The development of the legal concept of state action has varied according to the factual situation in which the issue arises." And further, that "when both the state and private groups join together to achieve goals thought to be good in the community," . . . "the Courts must evaluate the degree of control held by the state, the amount of state financial assistance to the operation of the activity, and the relationship of the activity to public purposes."

In *Boynton v. Virginia*,[25] this Court found violation of interstate commerce by a restaurant lessee of a bus terminal serving an interstate carrier, despite the fact that there was no lease between the interstate carrier and the terminal operator. The Court considered all the facts and was not concerned with the absence of any lease, thereby demonstrating that the existence or non-existence of a lease is not the essential factor, that the decisive element is the relationship of the parties and the public interest. Respondent requests that the same technique of looking at the facts, at the substance and not at the format, at the content and not at the symbol, should be followed here.

In *Gomillion v. Lightfoot*, 81 S. Ct. 125, — U. S. — (1960) the Court stated:

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23. 34 Notre Dame Lawyer 607, at 737.

24. *Idem*, p. 731.

25. 81 S. Ct. 182, — U. S. — (1960).

"Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations which gave rise to them, must not be applied out of context in disregard of variant controlling facts."

III. Reconciliation of the Rulings in the Cases Cited by Respondent With the Decisions Set Forth in Petitioner's Brief.

There can be no reconciliation between the rulings in the cases cited by respondent and those in petitioner's brief if the reconciliation is attempted on the basis of these general definitions of "state action." There is a touch of the government's "thumb on the scales"[26] under the facts in the cases cited by respondent, yet the holdings there are just the opposite to those in the cases offered by petitioner. It may be urged that there is less "exertion of state power" when the state merely licenses or grants a charter to a business than when it grants a lease for the use of public property. But when the state sells property condemned by it to private interests who are permitted to use the property in a discriminatory fashion, this involves a more potent exertion of state power than does the mere leasing of the property to one who practices discrimination. The lease is sooner or later terminable whereas property divested by the owner is irretrievable. It follows that either the general definitions of state action are not apt in all factual contexts, or that there may be exceptions to the general rule as to the effect of the equal protection clause on state activities, or that some other factor exists which causes the contrary rulings.

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26. *American Communication v. Doud*, 339 U. S. 382, 401, 70 S. Ct. 674, 685, 94 L. Ed. 925 (1950) in which the Court said, "When authority derives in part from government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by government itself."

In the *Civil Rights Cases*,[27] Justice Harlan quoted the following precept of legal technique:

> "It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body, the sense and reason of the law is the soul."

With this precept in mind, we should investigate the meaning and purpose of the provision in the Fourteenth Amendment that no state "shall deny to any person within its jurisdiction the equal protection of the laws." It is noteworthy that there is contained in these words no inhibition against racial discrimination, which has since been read into the statute, whereas action by the state is more specifically pointed to. The phrase "equal protection of the laws" is a more general, a more flexible, a more inclusive expression than the reference to state action. It may well be that what constitutes equal protection of the laws may differ under different factual circumstances, and that that may be the clue solving our effort at reconciliation of the divergent rulings.

Historically speaking, we note that the Fourteenth Amendment was enacted for the purpose of implementing the Thirteenth, freeing the slaves, by affording the Negro some measure of rights equal to that of his white brother.[28] Why then was the grant limited to protection against state action and not against action by private persons? It must have been because the framers of the Amendment thought it more important to maintain a private enterprise system free from federal control than to eliminate discriminatory practices among private individuals. The legal minds who conceived this Amendment must have believed that the state, since it is founded on universal tax contributions and personal services rendered by every member of the public, has

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27. See note 19 and p. 26 of 109 U. S. and p. 33 of 3 S. Ct.

28. Report of the United States Commission on Civil Rights, 1959 p. 10.

a fiduciary relationship to all the public similar to that which a trustee of property bears to all the beneficiaries of the trust and which a personal guardian owes to all his wards. Neither the private nor the public trustee may treat any of the beneficiaries or any of the public unfairly by any method of discrimination. Nor can this duty not to discriminate be evaded by subterfuge or by delegation of duties. The cases cited in note 4 of page 15 of petitioner's brief,[29] are instances where the courts have not permitted the public trustee to circumvent the duty by leasing part of the public facilities to private interests to perform in a discriminatory manner the duty which the public trustee was itself obliged to perform.

In the complex interplay of public duty and private rights, however, there have arisen moments when this simple rule, like many another, has become difficult of application. The duties of the state and the rights of private enterprise have sometimes become so entangled and interrelated that to hamper, to impede, or to restrict in any way the function of the private enterprise will result in great harm to the beneficiaries of the public trust. The facts in the "blighted area" cases illustrate one instance. There, the government by seizing private property in order to eliminate slums, has a duty toward its public, as a public trustee, not to divert the property from public use, nor to permit the property to be used in violation of the public obligation against discrimination. Apparently the public body could not redevelop the property itself and had to sell the property to private interests to perform the public task. Why, then, was this private enterprise permitted to exercise racially discriminatory methods in the performance of a

29. The case of *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (1960), cited by petitioner in this note 4, page 15, is no exception. The operation of a theater in the Courthouse could be justified only on the ground that it was related to the duties of operating the Courthouse. Otherwise, operating of the theater would not be permissible even on a non-discriminatory basis. Note that the Court considered whether the space leased out was "surplus property."

public duty? The reason stated by the Court is that the elimination of the blighted areas was "in the public interest."

The gain to the Negro and to all other segments of the population from the elimination of the slums outweighs the loss in equal protection of the laws. Indeed from the long range point of view it may well result in a more substantial contribution to equal protection of the laws than a rigid adherence to a previously announced formula. Likewise, the leasing or sale by the government of surplus property without restriction is justified by the ultimate benefit to all members of the public from preventing complete dissipation of the property.

IV. "Special" or "Extra" Property Owned by a State Agency Under Such Circumstances as Exist Here Should Be Treated in the Same Way as State Owned Surplus Property, That Is With Immunity From the Provisions of the Fourteenth Amendment.

Respondent has applied the expression "special" or "extra" to the property leased to the Eagle Restaurant because the Supreme Court of Delaware in *Wilmington Parking Authority v. Ranken*,[30] considering the very same property involved here, described it in such a way as to merit these adjectives. The Delaware Court, in the declaratory judgment action based on undisputed facts, held that extra space could be added to the parking facilities for a special purpose, that is to raise by private leasing a substantial portion of the money needed to operate the parking facilities. The space was not needed for parking and could be used at the very outset in a manner unrelated to the function of parking (R. 51).

True, it may be that the function of parking would include such incidental uses as providing food for the benefit of parking customers. But it was distinctly assumed in the

30. 34 Del. Ch. 439, 105 A. 2d 614 (1954).

Ranken case that the "extra" space would not be dedicated for incidental uses related to parking, and would be available to the highest bidder for any use. It happened only by chance, and not by prior choice of the Parking Authority, that the lease in the instant case was granted to a restaurant (R. 52).

The ordinary leasing of governmental property, where such leasing is permissible as incidental to a public use, is not predicated on the idea of obtaining the greatest amount of money but on giving service to the public. Financial loss is not generally the criterion for discontinuing a public business, as witness the operation of the United States Post Office Department. It would, therefore, not be proper for a public authority to rent out its facilities merely because it is operating at a loss, or because it can profit more from an outside rental than from self occupancy.

Where property, however, is not needed for any public service as when the property is surplus, "special" or "extra" as in our case, the best use of the property is to obtain the highest sum possible for it. True, the leasing of this property to private interests without any limitations as to use, may result in harm to those subjected to racial discrimination by the user. But the ultimate benefit to all the public including the members of the racially-discriminated group far outweighs the harm done. It is a fact that as white persons have moved out of the cities to restricted residential suburbs, more and more Negroes have been confined to the bounds of the city.[31] Regrettable as this is, it nevertheless follows that the Negroes in Wilmington will benefit comparatively more from public parking facilities in the city than will the whites.

Petitioner has argued that restrictions against racial discrimination by the lessee of the parking authority would not affect the number of applicants for the lease or the amount they would be willing to pay. Let us consider the

31. Report of the United States Commission for Civil Rights, 1959, pp. 366-367.

case of one of the lessees from the Wilmington Parking Authority, who operates a store for the sale of jewelry. If this store sells jewelry on credit, it undoubtedly discriminates against the Negro as a class. (We do not condone such discrimination by reciting its existence.) Banks and insurance companies practice one form or another of discrimination against the Negro.[32] White or Negro beauty parlors cater only to members of their own races. Various professions engage in racially discriminatory practices. Corporations of all sorts are very selective racially as to their choice for their boards and their management. None of these could without dissimulation seek to become lessees of the "extra" space of the Parking Authority if compelled thereby to deviate from their discriminatory practices.

Even with the adoption of the Fair Employment Practices Act, the sponsors of the act are not so naive as to believe that there will be an overnight metamorphosis in human nature. Though the act will do good in many respects, it will nevertheless drive some of the discriminatory employment practices underground.[32a] What is not done openly will be done secretly or under some pretext. But even if such discriminatory labor practices could be eliminated immediately, it would be unrealistic to assume that other forms of racially discriminatory business practices not prohibited by law will be discontinued in the near future. The Court is not sanctioning the continuance of these practices or encouraging their existence when it recognizes that they do exist and that it would be practically impossible for any public agency to do business with any private enterprise operated by members of the white race that is devoid of discriminatory practices toward the Negro in one form or another.

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32. *Idem*, pp. 510, 514, 526, 527, 531.

32a. "The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation," 74 Harvard Law Review 526.

Petitioner says:[33]

"Moreover, it is difficult to understand that any of the funds shown by the affidavit of the Authority's chairman as coming to it (R. 12), whether cash donated by the City of Wilmington, proceeds from the sale of the Authority's revenue bonds, parking revenues or leasehold rental income, once in the treasury of this public governmental agency, are other than public funds."

For that reason, petitioner in effect contends that the Eagle Restaurant is in no better position to claim special privileges than any of the other contributors. The basic fallacy in this argument is the assumption that all the contributors to the public fund receive the same privileges. It will be found that each of the lessees in the cases cited in petitioner's brief[34] receive greater privileges than do any of the taxpayers, for the lessees receive in addition to the services available to all taxpayers the opportunity to make a profit at the expense of the other taxpayers. But since any service the ordinary lessee confers upon the public agency is a service related to the function of the agency, which presumably the agency could do for itself, it is only fair that the ordinary lessee be subjected to the same restrictions as the leasor. The special lessee, however, like the Eagle Restaurant is entitled to greater privileges than the ordinary lessee for he performs a service which presumably the public agency can not perform for itself. He furnishes the additional money which the public agency needs in order to exist. The "special" lessee is more like the lessee of surplus property, or like the development company in the "blighted area" cases, or like the bank which loans money to the state agency, or like the auditors who audit the books of the public agency, all rendering a special service for the doing of which they should be immunized from the restrictive effect of the Fourteenth

33. Petitioner's brief, p. 15.
34. Note 4, p. 15, petitioner's brief.

Amendment in order that the general public may receive the greatest cooperation of private enterprise. The ultimate good to the general public justifies tolerance for the comparatively insignificant injustice resulting from the discriminatory practices.

Petitioner's charge that the Court's findings of facts are erroneous is refuted by the fact that the Court made the same findings five years before in the *Ranken* case, *supra*.[35] Furthermore, it may not be amiss to point out that in recent years a climate of racial tolerance has existed in Wilmington. Petitioner's affidavit (R. 34) as to the large number of restaurants in Wilmington and environs that have opened their doors without restriction attests to that. Shortly after the decision in *Brown v. Board of Education*,[36] the Wilmington public schools were completely integrated.[37] In 1953, the Wilmington Housing Authority by resolution eliminated segregation in public housing.[38] This policy was adopted even before any federal court had rejected the *Plessy v. Ferguson*[39] doctrine as applied to public housing. Theatres, at one time barred to Negroes, have been opened to all.[40] It would be found too, upon a visit to Wilmington, that all public swimming pools have removed racial bars. The Y. M. and Y. W. C. A. accept Negro membership, even though a very fine Y. M. C. A. built especially for and used exclusively by Negroes has existed in Wilmington for some time. The largest hotel in Wilmington, the DuPont Hotel, rents its lodgings and furnishes eating facilities to all persons. The State of Delaware, on July 9, 1960, enacted a Fair Employment Practice Act.[41]

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35. See note 30, *supra*.

36. 347 U. S. 483, 74 S. Ct. 686.

37. Report of The United States Commission on Civil Rights, p. 179 et seq.

38. *Idem*, 411.

39. 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

40. *Idem*, 174.

41. Senate Bill No. 397.

CONCLUSION.

For the reasons stated above, the appeal should be dismissed and judgment should be rendered for respondents on the petition for certiorari.

Respectfully submitted,

THOMAS HERLIHY, JR.,
Attorney for Respondent, Eagle Coffee Shoppe, Inc.



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No. 164

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM H. BURTON, APPELLANT

v.

THE WILMINGTON PARKING AUTHORITY, A BODY CORPORATE AND POLITIC OF THE STATE OF DELAWARE, AND EAGLE COFFEE SHOPPE, INC., A CORPORATION OF THE STATE OF DELAWARE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
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This case, we believe, presents issues of broad importance.[1] One need not elaborate upon the truism that there is growing participation by governmental agencies—national, state and local—in a host of activities designed to promote the public welfare. By the same token, it is a matter of great moment that public funds and property be utilized for the benefit of all citizens, without distinctions based on race, color, creed or other impermissible classification. The Constitution of the United States requires no less.

[1] The background facts are fully stated in appellant's brief, and we shall not attempt to restate them.

It is not amiss to point out that the United States is the single greatest landholder in the Nation. Under the Constitution, it may not discriminate. The Federal Government accordingly has the duty to insure that properties and facilities which it leases (for example, leases to concessionaires in the national parks) shall be accessible to the general public on a non-discriminatory basis. Corresponding duties rest upon the several states.

1. The Fourteenth Amendment applies to "State action of every kind, which * * * denies * * * the equal protection of the laws," *Civil Rights Cases*, 109 U.S. 3, 11. And there is state action, in the sense of the Fourteenth Amendment, when there is "state participation through any arrangement, management, funds or property," *Cooper* v. *Aaron*, 358 U.S. 1, 4. And see *Shelley* v. *Kraemer*, 334 U.S. 1, 20 ("State action * * * refers to exertions of state power in all forms").

In the instant case, the racial discrimination is by a restaurant located on public land (land purchased with public funds) operating within a public building constructed with public monies. The lease, moreover, makes an indispensable contribution to the support of activities in which the Authority engages elsewhere in the building. No more is required, we submit, to establish that access to the restaurant facility must be accorded without racial discrimination.

Indeed, we think it plain that the prohibitions of the Fourteenth Amendment have been held binding in situations where state participation might be deemed less direct and substantial than it is here.

In the *Girard* case, *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230, the discrimination (in that case, against Negro applicants for admission to Girard College) stemmed from the fact that an individual had placed limitations upon the use of monies which he had placed in a private trust. A state agency was involved in the matter as trustee, *i.e.*, it was engaged in carrying out the trust in accordance with its terms. This Court nonetheless concluded that the action of the trustee was "discrimination by the State" (353 U.S. at 231). The case thus illustrates the general principle that it is immaterial that the racial discrimination being enforced by a state agency has its origin in purely private action (*i.e.*, that the racial exclusion or discrimination was made in the first instance by an individual or private organization). What is material and decisive, for purposes of the Fourteenth Amendment, is that the state has chosen to place its power behind the discrimination. This it may not do, in any form or through any device. If a state cannot participate in the administration of a private trust which draws racial distinctions, as the *Girard* case holds, it follows, we believe, that it cannot lease its own property for a use which will involve denial of access on the basis of race. This is particularly so where, as in this case, the leased property is integrally related, both physically and by financial ties, to the conduct of other activities in which the public authority is engaged. See *infra*, pp. 8–10.

This Court has also placed sharp limitations upon the use of judicial process to enforce private acts of

discrimination. In *Shelley* v. *Kraemer*, *supra*, judicial enforcement of private racial restrictive covenants by means of injunctions, where the result was to create a condition which could not be established through state legislative action (*Buchanan* v. *Warley*, 245 U.S. 60), was held violative of the Fourteenth Amendment. In *Barrows* v. *Jackson*, 346 U.S. 249, the rule was extended to cover the assessment of damages for breach of such covenants. In *Marsh* v. *Alabama*, 326 U.S. 501, this Court ruled that state courts could not adjudge convictions for trespass against persons exercising their rights of free speech in a privately owned company town. In that context, the "private" action was deemed to be sufficiently infused with governmental aspects to be properly attributable to the state. The leasing of state property—particularly where the leased property remains an integral part of a public facility—certainly presents at least as many indicia of state action as were found in the cited cases.

2. There is also a large body of case law which deals with the precise type of problem presented here, *i.e.*, discrimination by a lessee of public property or facilities. See *Muir* v. *Louisville Park Theatrical Association*, 347 U.S. 971, vacating and remanding, 202 F. 2d 275 (C.A. 6) (leased open air theater); *Aaron* v. *Cooper*, 261 F. 2d 97 (C.A. 8) (leased school); *City of Greensboro* v. *Simkins*, 246 F. 2d 425 (C.A. 4), affirming 149 F. Supp. 562 (M.D.N.C.) (leased golf course); *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5), certiorari denied, 353 U.S. 924 (leased cafeteria); *Coke* v. *City of Atlanta*, 184 F. Supp. 579 (N.D. Ga.) (leased airport restaurant); *Jones* v.

Marva Theatres, 180 F. Supp. 49 (D. Md.) (leased motion picture theatre); *Tate* v. *Department of Conservation*, 133 F. Supp. 53 (E.D. Va.), affirmed, 231 F. 2d 615 (C.A. 4), certiorari denied, 352 U.S. 838 (leased beach); *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E.D. Va.) (leased airport restaurant); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.) (leased swimming pool).[2] Although these decisions are rested on various grounds—in some, that the lease was a technique of evading state responsibility; in others, that the property, though privately operated, was being used for a public purpose—they have been uniform in reaching the conclusion that the discrimination effectuated by the lessee was constitutionally forbidden.

Derrington v. *Plummer*, *supra*, is a case which, on its facts, is close to the one at bar. There, a restaurant was constructed in the basement of a new courthouse building. After completion, the space was leased to a private party for operation. Following a refusal of service, several Negroes brought suit to enjoin the County from leasing to any tenant who practiced such discrimination. Sustaining an injunction issued by the District Court, the Fifth Circuit held that the action of the lessee was not mere private

[2] See, also, *City of St. Petersburg* v. *Alsup*, 238 F. 2d 830 (C.A. 5), certiorari denied, 353 U.S. 922, holding that it is irrelevant, for purposes of the Fourteenth Amendment, whether the state's activity is "governmental" or "proprietary."

conduct, but partook of state action. The opinion stated (240 F. 2d at 925–926):

> Assuming no purpose of discrimination on the part of the County in the renewal of the lease, and further assuming no express reservation of control by the terms of the lease to prevent discrimination, * * * the basement of the courthouse can by no means be termed surplus property not used nor needed for County purposes. To the contrary, the courthouse had just been completed, built with public funds for the use of the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. Without more justification than is shown in this case, no court could countenance the diversion of such property to a purely private use.
>
> * * * If the County had rendered such a service directly, it could not be argued that discrimination on account of race would not be violative of the Fourteenth Amendment. The same result inevitably follows when the service is rendered through the instrumentality of a lessee; and in rendering such service the lessee stands in the place of the County. His conduct is as much state action as would be the conduct of the County itself. * * *

Similarly, in *Nash* v. *Air Terminal Services, Inc., supra,* the plaintiff was refused service in a privately run concession at the Washington National Airport. The court found (85 F. Supp. at 549) that the plaintiff had been denied his rights under the Fourteenth Amendment since the restaurant was operated "too

close, in origin and purpose, to the functions of the public government to allow them the right to refuse service without good cause." And in *Coke* v. *City of Atlanta, Georgia, supra,* the court appears to have discarded the exception suggested in the *Derrington* opinion, *i.e.,* that property not used or needed for governmental purposes may be operated free of the restrictions of the Fourteenth Amendment. Although it found that property at the Atlanta Airport Terminal leased as a restaurant was not used or needed for city purposes, the court held (184 F. Supp. at 585):

> Under the facts in this case the Court holds that the conduct of Dobbs Houses, Inc. [the lessee] is as much state action as would be similar conduct of the City of Atlanta itself and that the discrimination practiced by Dobbs Houses, Inc. in refusing to serve Negroes except upon a segregated basis is violative of plaintiff's rights as a Negro citizen under the equal protection provision of the Fourteenth Amendment. * * *

While the cases involving leases of government property deal with variant factual situations, they have one element in common: all of them involved facilities which, although operated by non-governmental lessees, were open to the public generally. Under such circumstances at least, where one segment of the general public is singled out and refused service solely because of race or color, "* * * the right of citizens to use public property without discrimination on the ground of race may not be abridged by the mere leasing of the property." *City of Greensboro* v. *Simkins,* 246 F. 2d 425, 426 (C.A. 4).

3. The grounds of distinction offered by the opinion below are not, in our view, tenable. These grounds are (a) that the use of public funds to create and operate the Authority was so slight as not to change the private nature of the enterprise (R. 53), and (b) "that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility" (R. 52).

A. We believe it unnecessary under the Constitution for a court to determine the precise extent to which the Wilmington Parking Authority is underwritten by public money, for there is no question that the Authority is an agent of the State. The statute creating the Authority specifically provides so. 22 Del. C. 504(a).

Even if the amount of public contribution were a material factor, the court below acknowledged that 15 per cent of the costs of constructing the Authority's facility consisted of public monies[3] (R. 50, 53). Such a contribution is not *de minimis*. Moreover, the court below has ignored the fact, manifest in the record, that the City of Wilmington gave the Authority $1,822,827.69 of public funds and that this sum was used to redeem the Authority's revenue bonds and to repay its bank loan.[4] In addition, it would seem that the funds received by the sale of

[3] The court's calculation was based only upon the $934,000 "advanced" by the City of Wilmington (R. 50).

[4] The affidavit of Jay C. Pownall, chairman of the Wilmington Parking Authority, submitted to the Court of Chancery and included in the record before the Delaware Supreme Court, attests to the $1,822,827.69 donation by the City of Wilmington.

revenue bonds were as much public funds as the monies donated by the City of Wilmington. The bonds were sold by an agency of the state and were deposited in the treasury of an agency of the state.[5]

B. The court below also gave great weight to its determination that a restaurant within a parking facility is not designed "for the convenience and service of the public using the parking service." It is not necessary, however, to say that those members of the public who utilize the parking facilities have need of the restaurant's services in order to conclude that the operation of the restaurant is integrally related to the public activity which is the primary concern of the Authority.[6] It is undisputed that it would not

[5] See *Tate* v. *Department of Conservation and Development*, 133 F. Supp. 53 (E.D. Va.), affirmed, 231 F. 2d 615 (C.A. 4), certiorari denied, 352 U.S. 838, and *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.) where the facilities involved were constructed by state agencies with funds derived almost entirely from the sale of public bonds.

[6] The public importance of the Authority's activities cannot be doubted. The Parking Authority Act of 1951 (22 Del. C., Ch. 5)—under which the Wilmington Parking Authority was created—contains a detailed statement of findings and policy (Sec. 501). This statement emphasizes the urgency of traffic control and stresses the need to provide adequate parking facilities. It states:

"The establishment of a parking authority will promote the public safety, convenience, and welfare * * * therefore it is declared to be the policy of this State to promote the safety and welfare of the inhabitants thereof by the creation in incorporated cities of bodies corporate and politic to be known as "Parking Authorities * * *."

The 1951 Act also gives the Authority the power to lease where "such leasing is necessary and feasible for the financing and operation of such facilities" (Sec. 504(a)). And see *Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 439, 105 A. 2d 614, holding that the furnishing of off-street parking is a proper public purpose which meets an existing need.

be possible for the Authority to carry out its authorized public purpose—providing off-street parking facilities—in the absence of revenues from Eagle and other lessees in the building. The opinion below stated (R. 51) that commercial leasing was "necessary financially to the project." And, since the leasing activity is vital to the functioning of the Authority, it cannot be heard to assert that it is free to conduct that activity without complying with the constitutional standards applicable to all forms of state action.

In *Boynton* v. *Virginia*, No. 7, this Term, decided December 5, 1960, the Court was also dealing with a restaurant, one which was located in a bus terminal. The Interstate Commerce Act, Part II, regulates carriers only. Moreover, carriers are not required to provide restaurants in their terminals. But the facts of the *Boynton* case disclosed a close interrelationship between the carrier's service and the restaurant. The Court concluded that:

> * * * where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers * * * an interstate passenger need not inquire into documents of title or contractual arrangements in order to determine whether he has a right to be served without discrimination.

The rationale of the *Boynton* case, although that decision involved only a statutory problem, is pertinent here. The facts here demonstrate that the Authority's commercial leases form an "integral part" of its activity. In these circumstances, the State and

its lessee are similarly foreclosed from pursuing a racially discriminatory arrangement. A patron entering the public building owned by the Authority and bearing its name has the right, without inquiring into the documents between landlord and tenant, "to be served without discrimination."

CONCLUSION

The judgment of the Supreme Court of Delaware should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
HAROLD R. TYLER, JR.,
Assistant Attorney General.

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IN THE

Supreme Court of the United States

October Term, 1960.

No. 164.

WILLIAM H. BURTON,
Plaintiff-Appellant,

v.

THE WILMINGTON PARKING AUTHORITY
and
EAGLE COFFEE SHOPPE, INC.,
Defendants-Appellees.

APPELLEE THE WILMINGTON PARKING AUTHORITY'S BRIEF.

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IN THE

Supreme Court of the United States.

No. 164, October Term, 1960.

WILLIAM H. BURTON,
Plaintiff-Appellant,

v.

THE WILMINGTON PARKING AUTHORITY

AND

EAGLE COFFEE SHOPPE, INC.,
Defendants-Appellants.

JURISDICTION.

Appellee, The Wilmington Parking Authority, hereinafter called "Authority", pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, has heretofore moved that the appeal be dismissed and/or that the judgment of the Supreme Court of the State of Delaware be affirmed on the grounds that the decision below was not in favor of the validity of a Delaware statute under the Constitution, treaties or laws of the United States; and that the question presented is so unsubstantial as not to need further argument. Authority's contentions in this behalf are hereinafter made.

STATEMENT OF THE CASE.

Without excepting to Appellant's statement of the case, Authority states that the facts material to the consideration of the questions presented are as follows. Appellant was denied service, solely on account of his race, in the restaurant operated by appellee Eagle Coffee Shoppe, Inc., hereinafter called "Eagle", as lessee of a portion of a public parking facility in Wilmington, Delaware, owned and operated by Authority.

Authority's motion for summary judgment, upon which it prevailed below, and the supporting affidavits, took no exception to the material allegations of the verified complaint and appellant's supporting affidavits, excepting for certain matters averred in paragraphs 7 and 8 of the complaint (R2-3).[1] Paragraph 7 avers that Authority refused service to appellant through its instrumentality, Eagle. Paragraph 8 avers that such refusal was in pursuance of a policy adopted, consented to and acquiesced in by Authority. These averments are denied. Authority averred that its relation to Eagle is defined, in its entirety in the agreement of lease (R13 et seq.) and that it therein appears as a matter of law that Eagle is not Authority's instrument.

The material allegations of the complaint (R1-4) which are admitted are as follows. Authority is a body corporate and politic of the State of Delaware exercising public powers of the State as an agency thereof. Its statutory purpose is to furnish off-street parking to the public. Eagle is a private Delaware corporation in the restaurant business. It occupies a portion of Authority's facility pursuant to the aforesaid lease. The lease, among others, was necessary to finance the facility. The site of the facility was purchased by funds donated by the City of Wilmington. Construction was financed through revenue bonds delivered

1. Reference is to Transcript of Record, pp. 2-3.

on Authority's sole credit.[2] To make the bonds saleable, rental income from long-term leases was required in addition to parking revenues. Eagle furnished its own finishings, fixtures and equipment. The lease reserves no control in Authority over Eagle policies respecting patrons. The lease does provide that Eagle "shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority". In fact, Authority has never directed or ratified any Eagle policy (R11-13).

SUMMARY OF ARGUMENT

1. The opinion below does not depend upon the determination of the validity of a state statute under the Constitution, treaties or laws of the United States. Rather, the opinion depends upon the conclusion, bottomed upon undisputed facts, that as a matter of law, Eagle was not an agency of the State of Delaware.

2. The Fourteenth Amendment to the United States Constitution is not applicable to the acts of Eagle because it carries on its business independent of any control by the State of Delaware. The acts of Eagle as respects appellant and members of his class are private acts in pursuance of a private business. The relationship of Authority and Eagle as landlord and tenant is insufficient to constitute the latter the former's agent. The relationship of appellees in its entirely is defined by their certain agreement of lease,

2. 22 Del. C. § 504(c) expressly provides Authority shall not "pledge the credit or taxing power of the State of Delaware or any political subdivision, nor shall any of its obligations be deemed to be obligations of the State of Delaware, or of any of its political subdivisions, nor shall the State of Delaware or any political subdivision thereof be liable for the payment of principal or of interest on such obligations."

ARGUMENT.

I.

This Court Is Without Jurisdiction.

This is an appeal from the judgment of the Supreme Court of the State of Delaware, reversing the judgment of the Court of Chancery of the State of Delaware in and for New Castle County. As recited above, appellant was denied service solely on account of his race in the restaurant operated by Eagle as lessee of a portion of Authority's public parking facility in Wilmington, Delaware. Appellant prayed declaratory and injunctive judgment requiring Authority and Eagle to furnish restaurant services to him and persons of his race.

The opinion of the Supreme Court of the State of Delaware, dated January 11, 1960 (R42-54), discloses that the conclusions of the Court do not depend upon a determination of the validity of Title 24, Delaware Code, Section 1501, under the Constitution, treaties or laws of the United States. The opinion depends, rather, upon the conclusion that Eagle was not an agency of the State of Delaware. Appellant seeks to establish his right to appeal under the provisions of Title 28, United States Code, Section 1257(2) and to this end predicates the opinion below upon a determination of the validity of the State statute in question. Authority believes that the language of the Delaware Supreme Court so far as it concerns Section 1501 aforesaid is collateral to the primary and dispositive determination that upon the undisputed facts Eagle was not Authority's agent.

Section 1501 aforesaid provides:

"§ 1501. Exclusion of customers; definition

No keeper of an inn, tavern, hotel or restaurant, or other place of public entertainment or refreshment of

travelers, guests, or customers shall be obliged by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business.

As used in this section, 'customers' includes all who have occasion for entertainment or refreshment."

The Court below makes it clear that it bottoms its opinion, not upon the ground that Eagle is a restaurant keeper entitled to privileges afforded by Section 1501, above, but upon the conclusion that Eagle's discrimination was not State action. The text of the opinion so states in express terms (R53-54):

"We think the Authority and through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware.

"It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in 24 Del. C., § 1501 with respect to restaurant keepers. 10 Am. Jur., Civil Rights, §§ 21, 22; 52 Am. Jur. Theatres, § 9; Williams

> v. Howard Johnson's Restaurant, 268 F. (2d) 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment."

The Court holds that Section 1501 becomes operative only because the discrimination is without the Fourteenth Amendment. The determination that Eagle is not Authority's agent and thus without the Fourteenth Amendment does not depend upon a determination of the validity of Section 1501 under the United States Constitution.

While it seems clear that Section 1501 would be unconstitutional as applied to State action, this circumstance, it is respectfully submitted, does not serve to afford jurisdiction in the present case. Insofar as Section 1501 applies to private action, it is expressive of the common law. See *Williams v. Howard Johnson's Restaurant*, cited above.

Authority agrees with appellant that a statute requiring racial distinctions may in certain applications violate the Fourteenth Amendment.[3] As contended above, no such statute is here involved. In *Gayle v. Browder*,[4] this Court affirmed without opinion that ordinances of the City of Montgomery and statutes of the State of Alabama requiring segregation were unconstitutional. The United States District Court below held:

> "In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835. Indeed, we think that such liberty is guaranteed by the due process clause of that Amendment."

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3. Appellant's Brief, p. 9.

4. Gayle v. Browder (U. S. D. C., Ala.) 142 F. Supp. 707, 715 (1956).

Authority notes *Brown v. Board of Education of Topeka*,[5] which holds the "separate but equal" doctrine inapplicable in the field of education, but finds no application in the premises.

It is nowhere express or implicit in the opinion below that Section 1501 is valid under the Constitution in its present application and no appeal lies under 28 U. S. C. 1257(2).

As appears from the text of the opinion below the facts of the present case are anomalous if not unique and no appropriate case for certiorari is submitted under Rule 19.

II.

The Fourteenth Amendment to the United States Constitution Is Not Applicable to Eagle's Acts.

1. The Opinion Below Does Not Depend Upon Section 1501.

As hereinafter contended at length Eagle's discrimination was private action and accordingly appellant cannot invoke the Fourteenth Amendment. Appellant tilts with windmills when he attacks Section 1501. The sole question for determination is whether state action is involved. As applied to private action the validity of Section 1501 cannot be tested on this appeal.

2. Eagle's Discrimination Is Private Action.

No control of the premises leased to Eagle is reserved to Authority either by law or the terms of the lease. The requirement that Eagle "shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority" begs rather than determines the question. If Eagle's action is private, there is no applicable law except local health and police regulations.

The record makes clear that Authority has not, in fact, exercised control over Eagle and its patronage policies.

5. Appellant's Brief, p. 9.

The thrust of appellant's argument seems to be that the relationship between Authority and Eagle as lessor and lessee suffices to make the latter's discrimination state action. At page 15 of his brief, appellant says, "That a public lessor and its lessee of government-owned realty are so related as to be mutually involved in state action is the clear rationale and result of the decided cases". This generalization falls of its own weight. In each of the cases cited, decision is based upon the peculiar facts.

Recent cases are illuminative but not dispositive because the factual aspects of the agency question are various. They are largely relevant in their distinctions. Most recent and pertinent is *Boman v. Birmingham Transit Company*, (U. S. C. A. 5) 280 F. (2d) 531 (1960). A Birmingham ordinance provided that carriers might promulgate rules and regulations for seating and that refusal to obey the same was a misdemeanor. In pursuance, bus signs directed Negroes to seat from the rear. Appeal was taken from judgment dismissing action to enjoin enforcement of the rule. The Court held that the franchised carrier was on public business. The present impact of the case is that it is determined by comprehensible principles of the law of agency.

> "• • • We fully recognize what has been known by all to be the law since the Supreme Court decided the Slaughter-House Cases, 16 Wall. 36, 83 U. S. 36, 21 L. Ed. 394, that 'the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States • • •'. Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 842, 96 L. Ed. 116. We are forced to the conclusion here that the conduct of the Bus Company 'may fairly be said to be that of the' State of Alabama through its franchising of the Bus Company and its authorizing it to adopt the rule in question enforceable by criminal sanctions."

Boman's pertinence, of course, is in its distinctions. It is clear that the ordinance in question, enacted on the day of repeal of an earlier ordinance which required separate seating for Negroes, was designed to accomplish the same result. Further, criminal sanctions were provided. The court notes, "Of course, the simple company rule that Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of its patrons, would not effect a denial of constitutional rights if not enforced by force or by threat of arrest and criminal action. Where, as here, the City delegated to its franchise holder the power to make rules for seating of passengers and made the violation of such rules criminal, no matter how peaceable, quiet or rightful (as the Court here held) such violation was, we conclude that the Bus Company, to that extent, became an agent of the State and its action in promulgating and enforcing the rule constituted a denial of the plaintiff's constitutional rights".

In *Williams v. Howard Johnson's Restaurant*, (U. S. C. A. 4) 268 F. (2d) 845 (1959) the Court affirmed dismissal of action for refusal of a private restaurant to serve a Negro. Plaintiff contended that because the state licensed restaurants the state is under a duty to prohibit discrimination. The Court held, however, that unless the discriminations were practiced "in obedience to some positive provision of state law", they were not actionable. The Court pointed out that the licensing statute "does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment".

In *Eaton v. Board of Managers of James Walker Memorial Hospital*, (U. S. D. C., N. C.) 164 F. Supp. 191 (1958), three Negro doctors for themselves and members of their class sued for admission to practice at the hospital on its so-called "courtesy staff". The hospital was estab-

lished pursuant to a public law of the State of North Carolina which authorized the City of Wilmington and New Hanover County so to do. Land was acquired—whether by eminent domain or otherwise does not appear from the report—and the City Hospital of Wilmington was built, subsequent expenses being borne forty percent by the City and sixty percent by the County. Later, Mr. James Walker offered to build a new hospital as a gift. The North Carolina legislature enacted a private law chartering the defendant Board of Managers of James Walker Memorial Hospital to manage the hospital built by Mr. Walker's gift. The express purpose of the private law was to provide management for a hospital to care for the poor of the City and County. Upon completion of the new hospital, the City and County conveyed the lands to the Board for so long as the same should be used for the purposes of the hospital as aforestated, otherwise to revert. The charter gave the Board absolute management powers. Various subsequent legislative acts provided that the City and County should make certain appropriations for the operation of the hospital and it was so financed.

The plaintiffs applied for courtesy staff privileges which entailed use of rooms and wards for their patients. They were denied admission solely because they were Negroes.

The Court stated that "the legal test between a private and a public corporation is whether the corporation is subject to control by public authority". And, "The essence of this concept is that the present ability to control carries with it the responsibility for the present action of that which can be controlled". The Court concluded its statement of the applicable legal principle as follows: "In short, the present ability to control must be determined by considering the sum total of all existing relationships between the corporation and the State". The Court concluded that the act of discrimination was not "state action".

In *Derrington v. Plummer*, (U. S. C. A. 5) 240 F. (2d) 922 (1957) cert. den. 77 Sup. Ct. 680, 353 U. S. 924,[6] Harris County, Texas maintained a courthouse in which the county leased to a private person a cafeteria equipped and furnished by the county. The courthouse had been built with public funds for the use of all citizens and the cafeteria was designed to serve their requirements. The Court held that the restauranteur's common law privilege to select clientele arbitrarily did not extend to the lessee of the cafeteria under all the facts of the *Derrington* case. The exclusion—systematic or sporadic—of Negroes by the operator of the cafeteria was held to fall within the prohibition of the Fourteenth Amendment, notwithstanding the lessor reserved no control over the lessee under the lease. However, the Court concedes at page 925 of the report of the opinion that in certain circumstances a lease could be made by the county to a private person such that the Fourteenth Amendment would have no application. The gist of the holding is that "The express purpose of the lease was to furnish cafeteria services for the benefit of persons having occasion to be in the county courthouse".

The pertinent distinction is that the object of the Eagle lease is not to afford services for patrons of the parking facility but to furnish rental income for amortization. Moreover, the parking facility, unlike the Harris County Courthouse, was not built with public funds.

Also pertinent is *Sweeney v. City of Louisville*, 102 F. Supp. 525 (1951). This was an action for declaratory judgment as to the rights of Negroes to use the facilities at Louisville's 23 public parks, which were equipped with 5 golf courses, an amphitheatre, pavilions, winter sports and a fishing lake. The action was by the individual plaintiffs for themselves and their class. One plaintiff complained he was refused golfing privileges; a second plaintiff complained no fishing; and a third plaintiff complained that the

6. Appellant's Brief, p. 17.

theatre was leased to an all-white group. As to golfing and fishing, the District Court held that the facilities furnished by the city to both races were separate but equal and that accordingly there was no violation of the Fourteenth Amendment. As to the theatre, the court held that there was no evidence that any group had been denied the use thereof on the same terms as the corporation comprised of white persons which had used the theatre. It is the theatre aspect of the *Sweeney* case which relates to the present case.

So far as appears from the report, all of the park facilities excepting the amphitheatre were operated by the city. The amphitheatre, however, was operated by a private corporation as lessee. Erected at public expense, except for $5,000.00 contributed by the private non-profit corporation, the facility was leased by the city for a term of five years to the said corporation. The pertinent features of the lease were as follows. The Lessee corporation had the sole and exclusive right of use of the premises on specified dates. The corporation had the right to sell refreshments to the public and to make reasonable charges therefor consistent with the policy of maintaining low prices. The corporation was obligated to clean the premises and furnish electricity. It was to report admission fees and attendance and other information necessary to enable the city to determine from time to time that the facility was being operated in the public interest. The corporation was further obligated to furnish statements of all receipts and expenditures. It was to recoup its $5,000.00 contribution out of the profits and pay over subsequent profits to the city. The city reserved to itself the right to make rules and regulations governing the use of the facility with the object of preserving good order, preventing immorality and the incitation of racial or religious antagonisms. The city further reserved the right to terminate the lease if it determined that the theatre was not used in the best interest of the public.

One of the plaintiffs appealed. *Muir v. Louisville Park Theatrical Association*, 347 U. S. 971, 74 S. Ct. 783 (1954).[7] The Supreme Court in a memorandum decision vacated judgment below and remanded "for consideration in the light of the Segregation Cases decided May 17, 1954, Brown v. Board of Education, etc., 347 U. S. 483, 74 S. Ct. 686, and conditions that now prevail". The gist of the *Brown* case is that the doctrine of "separate but equal" has no place in the field of public education. As noted above, the Kentucky District Court had disposed of a part of the *Sweeney* case on the ground that the city had furnished separate but equal facilities in all respects except as to the amphitheatre. As to the theatre, the court determined that no Negro group had ever sought and been refused use of the same. Thus the impact of the *Muir* decision upon this aspect of the *Sweeney* case—being the apposite aspect here—is not determined. The rejection of the separate but equal doctrine does not affect the question relative to the Louisville theatre. Actually, except insofar as the destruction of the separate but equal dogma, the *Sweeney* and *Muir* cases shed little light here. Remand by the Supreme Court for reconsideration in the light of the Segregation Cases is not tantamount to a holding that the use of the Louisville theatre by an all-white group fell within the Fourteenth Amendment. Clearly, separate but equal does not now apply to transportation and schools. However, this is not to say that a private corporation operating the theatre in the Louisville public park or that a private corporation operating a restaurant in the Authority's parking facility is within the Amendment and cannot exclude Negroes.

Eagle is a private concern. Authority reserves no control. The restaurant—and it might well have been a shoe store or other private business—was leased to afford rental income for amortization only.

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7. Appellant's Brief, p. 15.

It may be noted in passing that Louisville reserved considerable control over the corporation operating the theatre. The Authority has no such control over Eagle.

In *Nash v. Air Terminal Services, Inc.*, (U. S. D. C., Va.) 85 F. Supp. 545 (1949),[8] a Negro sued for damages allegedly resulting when she was refused service in an airport restaurant because of her race. Conceding the right of a private restaurant to refuse service, the court held that the airport restaurant was agent of the Federal Government:

> "But we do not believe the same principle of law is applicable to this defendant's restaurants at the Washington National Airport. They are operated on public property in a building constructed with public funds and under a concession from the public government. In effect, the concessionaire here is conducting the facility in the place and stead of the Federal government. To conclude otherwise would overlook not only the status and purpose of the airport, but also the purpose of the concession. It is to provide food and refreshment to the public in travel and to complement the facilities offered by the United States Government in support of air transportation. We do not hold that Air Terminal was an air carrier or engaged in air transportation; we do hold its restaurants are too close, in origin and purpose to the function of the public government to allow them the right to refuse service without good cause."

The *Nash* case in gist held that Air Terminal operated its restaurant in "the place and stead" of the Federal Government, and that absence of equal accommodations violated the Fifth Amendment.

Distinguishable are *Culver v. City of Warren*, 84 Ohio App. 373, 83, N. E. (2d) 82; *Kern v. City Commissioners*,

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8. Appellant's Brief, p. 16.

151 Kan. 565, 100 P. (2d) 709;[9] and *Lawrence v. Hancock*, (U. S. D. C., W. Va.) 76 F. Supp. 1004, all of which involved efforts to exclude Negroes by enveloping public activities in the veils of ostensibly private corporations.

Tate v. Departments of Conservation and Development, (U. S. D. C., Va.) 133 F. Supp. 53 (1955),[10] holds that leased state parks must be operated without racial discrimination. The court expressly recognized that the lease was a subterfuge to avoid the Fourteenth Amendment. *City of Greensboro v. Simkins*, (U. S. C. A. 4) 246 F. (2d) 425 (1957),[10] holds that a leased municipal golf course cannot exclude Negroes. In *Jones v. Marva Theatres, Inc.*, (U. S. D. C., Md),[10] a theatre in a city hall building, originally built as a place of public assembly, was leased to a private motion picture exhibitor. The court holds that the lessee cannot segregate Negroes in seating and toilet facilities.

Coke v. City of Atlanta (U. S. D. C., Ga.) 184 F. Supp. 579 (1960),[9] involved segregated seating in a restaurant operated by a private lessee in a city-owned airport terminal building. The court held, without disclosing its reasoning, that state action was involved. Presumably, the rationale of the *Nash* case above governed.

3. Contribution of Public Monies Is Not Material.

Within conventional modes of legal reasoning, it is not apparent what pertinence the contribution of public monies in any amount bears to the question whether state action is involved. If financing were completely by public donation, it does not follow under any rule of agency that a private lessee of a portion of the facility becomes the agent of the State as contended by appellant. Such reasoning is dangerously excursive because it is without guiding principle other than a priori conviction as to what may be

9. Appellant's Brief, p. 16.

10. Appellant's Brief, p. 15.

a socially desirable result. Authority believes that the Delaware Supreme Court stated the test for State action:

> "Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; (fo. 69) if it is not the case, the operators of the enterprise are free to discriminate as they will. Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 842. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy." (R53)

Appellant's statement at page 17 of his brief that "Previous attempts by state governments at divesting themselves of the power to insist on nondiscrimination have been exposed and state responsibility enforced", is entirely gratuitous because it is nowhere intimated in the record that the Eagle lease was designed to permit discrimination.

CONCLUSION.

Authority respectfully concludes that this Court is without jurisdiction of the present appeal because the decision below was not based upon a determination of the validity of Section 1501 under the Constitution, but upon the finding that Eagle was not Authority's agent and no State action was involved such as to invoke the Fourteenth Amendment.

The entire relationship of Authority and Eagle is embodied and defined in their agreement of lease. It nowhere appears in the record that Eagle was Authority's agent generally or in the premises. There is no reasoned legal

basis for the conclusion that State action was here involved and the prohibitions of the Fourteenth Amendment are inapplicable.

The judgment below should be affirmed.

Respectfully submitted,

CLAIR JOHN KILLORAN,
Counsel for Appellee,
The Wilmington Parking
Authority.

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IN THE

Supreme Court of the United States

October Term, 1960.

No. 164.

WILLIAM H. BURTON,

Petitioner,

v.

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware,

and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Respondents.

On Certiorari From the Supreme Court of the State of Delaware.

MEMORANDUM SUBMITTED BY RESPONDENT, EAGLE COFFEE SHOPPE, INC., UNDER RULE 41(5).

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 164.

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v.

THE WILMINGTON PARKING AUTHORITY, A BODY CORPORATE AND POLITIC OF THE STATE OF DELAWARE

AND

EAGLE COFFEE SHOPPE, INC., A CORPORATION OF THE STATE OF DELAWARE,

Respondents.

ON CERTIORARI FROM THE SUPREME COURT OF THE STATE OF DELAWARE.

MEMORANDUM SUBMITTED BY RESPONDENT, EAGLE COFFEE SHOPPE, INC., UNDER RULE 41(5).

Respondent submits this memorandum under Rule 41(5) of the Rules of the Supreme Court of the United States. This memorandum presents late authority that was

not available for respondent's brief in chief.[1] The *amicus curiae* brief supporting the petitioner was received in the form of page proofs on January 19, 1961. The printed briefs were received January 23, 1961. Thus, the respondent did not receive either form until after it had filed its brief in chief on January 18, 1961. Respondent, therefore, feels it is entitled to reply to the *amicus curiae* memorandum submitted by the United States. This memorandum constitutes its reply.

ARGUMENT.

The respondent submits that the Eagle Coffee Shoppe is not integrally related to any of the activities in which the Wilmington Parking Authority is engaged. Also, the respondent submits that the lease was not executed with the purpose of allowing the Parking Authority to escape its constitutional obligation not to discriminate. In the *amicus curiae* memorandum submitted by the United States, it is stated at page 3:

> "What is material and decisive, for purposes of the Fourteenth Amendment, is that the state has chosen to place its power behind the discrimination. This it may not do in any form or through any device. . . . This is particularly so where, as in this case, the leased property is integrally related, both physically and by financial ties, to the conduct of other activities in which the public authority is engaged."

A more complete examination of the facts than a superficial examination of the physical and financial relations between the restaurant and the Parking Authority shows that this restaurant is not within the nexus of state action.

To assist this Court in its analysis of the facts in the case at hand, the respondent sets forth the approach sug-

1. Lewis, *The Meaning of State Action*, 60 Col. L. Rev. 1083 (1960).

gested by Thomas P. Lewis in *The Meaning of State Action*, 60 Col. L. Rev. 1099, 1100:

> "A connection between the state and the conduct of the lessee may be found in the relationship of a state to all of its leased property as owner and lessor. It is equally possible, however, to analyze the situation in terms of the private character of the lessee, especially when he has paid a fair consideration for the lease. The bases of these diverse analyses must be diverse attitudes concerning the existence of a principal-agent relationship between the lessor and lessee, or diverse attitudes covering the nature of the state's duty as lessor. As in the voting cases, the finding of a state duty to regulate its private tenant and a description of the lessee as an agent of the state may be two ways of saying the same thing. In any event, unless a lessee of the state is always an agent of the state, some basis must exist for labeling him an agent in particular cases. *The view taken here, which the cases seem to support, is that the nature of the function performed is the controlling factor.* That the state is lessor has significance because the circumstances bringing the lessor-lessee relationship into existence may indicate the nature of the function." (Emphasis supplied.)

Here the function of the state agency, i.e., the Parking Authority, is to promote the public safety and welfare by providing for off-street parking in the City of Wilmington.[2] The function of one of the lessees of the Parking Authority is to engage in the restaurant business as a private entrepreneur. The Delaware statute creating the Parking Authority does not indicate in any way that the Authority is to provide any other services for the public than off-street parking. The restaurant did not lease the space in the Parking Authority's building for the purpose of cater-

2. 22 Del. C. § 501, cited in full in Petitioner's Brief, pp. 19, 20.

ing to the parking customers. The rented space used by the restaurant is a primary location for such a business independent of the activities of the Parking Authority. There is no public entrance leading from the parking portion of the facility into the restaurant. Customers of the restaurant enter by means of an entrance located on a main public street (R. 49). Thus, an examination of all the surrounding circumstances shows that the restaurant's purposes and activities do not fall within the functions of the Parking Authority.

The circumstances bringing the lessor-lessee relationship into existence are plainly set forth in the Delaware statute. Simply, the highest bidder was to be granted the various rental areas for the purpose of providing a rental income to the authority necessary for the financing and operation of the facilities.[3] The memorandum for the United States seizes upon this point and says at page 10:

> "... And, since the leasing activity is vital to the functioning of the authority, it cannot be heard to assert that it is free to conduct that activity without complying with the constitutional standards applicable to all forms of state action."

Respondent submits that only the leasing activity and not the activity of the restaurant is "vital to the functioning of the Authority." Thus, the restaurant is not integrally related to the function of the public authority and not bound by the constitutional requirements of state action.

The absence of other evidentiary facts shows that the restaurant is a private business free to select the persons with whom it will do business. The opinions cited by the petitioner and the United States have decided that an activity falls within the realm of state action for factual reasons that are not existent in the case at hand. There is no history of discrimination by the Parking Authority which

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3. 22 Del. C. § 504(a).

would make this lease a subterfuge to avoid the requirements of the Fourteenth Amendment.[4] Also, there is no statutory control,[5] nor administration and policy-direction control of the activity in question.[6] Finally, and most important, a thorough examination of the functions of the public authority and the restaurant shows there is nothing more than a bare lessor-lessee relationship. The functions are not integrally related since the restaurant facility does not exist by virtue of a governmental effort to serve a public need or want.[7]

An analogous situation arose in a case before the Interstate Commerce Commission. *NAACP v. St. Louis-S. F. Ry.*, 297 I. C. C. 335, 1 Race Rel. L. Rep. 263 (1955). A restaurant located in a railroad terminal segregated its white and negro customers. The restaurant, which was a lessee of the terminal, was located in the terminal which was used by several interstate carriers. The Commission held that the terminal had to eliminate discriminatory practices in its restrooms and waiting rooms, but it held that the restaurant was not under jurisdiction of the Interstate Commerce Commission. The Commission did not order the restaurant's discriminatory practices to cease because it found upon examination of the facts beyond the lease arrangement that the restaurant was not an integral part of the terminal's activities.

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4. Such existed in: *Culver v. City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948); *Kerr v. City Comm'rs*, 151 Kan. 565, 100 P. 2d 709 (1940); *Tate v. Departments of Conservation and Development*, 133 F. Supp. 53 (E. D. Va. 1955).

5. *Boman v. Birmingham Transit Company*, 280 F. 2d 531 (5th Cir. 1960).

6. *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230 (1957) (The *Girard* Case).

7. *Derrington v. Plummer*, 240 F. 2d 922 (5th Cir. 1957), cert. den. 353 U. S. 924 (1957); *Nash v. Air Terminal Services, Inc.*, 85 F. Supp. 545 (E. D. Va. 1949). See Lewis, *The Meaning of State Action*, 60 Col. L. Rev. 1083, 1100 (1960).

Therefore, *Boynton v. Virginia*[8] is not analogous to the case at hand because the facts reveal the *functions* of both the interstate bus terminal and the restaurant located therein to be integrally related. Respondent submits that this Court's opinion in *Boynton* and the Commission's opinion in *St. Louis-S. F. Ry. Co.* represent the best approach in determining whether the lessee falls within the constitutional requirement of non-discrimination, that is, by an examination of the respective functions of the lessor and lessee.

If every lessee renting property from a state becomes a part of state action, it will result in a serious financial limitation on the state. Many private businesses will not bid on or enter such a lease agreement which will require them to meet the constitutional requirements of a public authority. This will limit financial assistance available to the state and be a burden which the public must bear. Since sources of income are important to the state, a reversal of the Delaware Supreme Court's decision would have the practical effect of a benefit to the Negro in one respect, but the reversal would also deprive the general public, including the Negroes, of a valuable source of income to the state.

Unless this Court is to hold that every lessor and lessee relationship, in which the state is lessor, binds the lessee to the requirements of the Fourteenth Amendment, then there must be a way of determining which lessees fall within such constitutional requirements. Respondent submits that a thorough examination of the activities and purposes of the lessor and lessee is the best approach. Since such an examination reveals a bare lessor-lessee relationship in the case at hand, the respondent, Eagle Coffee Shoppe, should be free to do business with whom it chooses. Mere rental income and physical connection with the lessor does not bring the restaurant within the requirements of State action.

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8. *Boynton v. Virginia*, — U. S. —, 81 S. Ct. 182 (1960).

CONCLUSION.

For the reasons stated above, the appeal should be dismissed and judgment should be rendered for respondents on the petition for certiorari.

Respectfully submitted,

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No. 164

WILLIAM H. BURTON,

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1960

No. 164

WILLIAM H. BURTON,

Appellant,

—v.—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

Statement

Since neither appellee takes issue with the statement of the facts as contained in appellant's opening brief, no further development of the facts is occasioned.

However, to avoid seeming to concur by silence, it is appropriate here to undertake to correct an erroneous statement of fact relating to the nature of the proceedings instituted in this Court by appellant, set forth at the beginning of the "Argument" in the brief of appellee, Eagle Coffee Shoppe, Inc.

It is not correct, as stated there, that "Petitioner [appellant] brought this case here solely on appeal" and subsequently, "after respondents [appellees] requested this Court not to take jurisdiction of the appeal," appellant then "countered" with the contention that the Court should grant certiorari.

Actually, the "Motion to Dismiss or Affirm" of appellee, The Wilmington Parking Authority, appellee Eagle filing none, was filed, as under Rule 16 of the *Revised Rules* of this Court it should have been, after appellant's position as to the alternative grounds for review had been made clear at p. 9 of his previously filed Jurisdictional Statement.

From that statement and the Notice of Appeal, it is apparent that appellant asserted from the outset, as the burden of his claim for review by this Court on appeal, the invalidity of 24 Delaware Code §1501, as construed and enforced by the court below. It is not a diminution of that position that appellant also recognizes that the conflict of the decision below with decisions in other state and federal courts on the important constitutional question of whether property of government can be employed in a racially discriminatory manner affords a sound alternative basis for consideration by this Court, i.e., certiorari.

ARGUMENT

I. The Utilization of the Statute by the Court Below

Appellees in their answering briefs seek to minimize the importance of the utilization of 24 Del. C., §1501, both by themselves and by the court in the decision below. Appellee Eagle's brief states, pp. 5-6, that in answers to the complaint the defendants (appellees) "referred to the statute by way of defense separate and apart from their main defense." The brief continues:

> "[T]he two Delaware Courts realized the interpretation of the statute was a relatively unimportant matter and need not even have been considered in determining the rights of the parties."

(a) Appellant readily acknowledges that the Vice Chancellor, in the trial court, found it unnecessary to consider the statute in deciding that plaintiff had a right to service in the restaurant. At the root of that decision was the relationship the Vice Chancellor found between Eagle and the Authority: the restaurateur, Eagle, tenant of the Authority in this "vital public facility," was obliged to carry out the Authority's duty as a state agency "not to deny to Delawareans the equal protection of the laws." Because the Vice Chancellor found the tenant not to be a purely private restaurateur, there was no need, the trial judge concluded, to consider a statute which the defendants, appellees here, in pleading[1] and argument[2] before him, insisted authorized a *private* restaurant keeper to practice racial discrimination.

(b) But this appeal obviously is not from that decision; it is from the contrary decision and judgment of the

[1] R-6, 8, 9, 11.

[2] Appellant's Brief and Appendix, p. 7 and ff. 1 and 2.

Supreme Court of Delaware. That court held Eagle a private operator and "subject to the provisions of 24 Del. C., §1501, which does not compel the operator of a restaurant to give service to all persons seeking such." Thus the court below explicitly utilized the statute to effect appellant's exclusion. Moreover, since the only circumstance alleged by appellees as bringing the refusal to serve appellant under the statute was appellant's being a Negro, the judicial ruling necessarily held the statute sanctioned Eagle's racially discriminatory conduct. Eagle concedes "the legality of the statute * * * was challenged" (Eagle's brief, p. 7). The Court's sustention of the statute against this challenge is clear and establishes the jurisdiction of this Court.

(c) Eagle now asserts (its brief, p. 9), despite its pleading the statute in its answer and motion for summary judgment, that it "rests its right to discriminate against Negroes" on the common law.

We suggest that Eagle only blurs the issue when it now contends that its defense is founded on a common-law right to operate its business as it sees fit, defines that defense in terms of a right to discriminate against Negroes, and seeks to analogize its alleged defense to that of the defendant in *Rice* v. *Sioux City Memorial Park Cemetery*.[3] The contention Eagle essays is that since its reliance on a common-law right to discriminate is "only by way of defense," there is no "judicial enforcement of that defense."

In the *Rice* case a claim for damages for breach of contract was based on a cemetery's refusal to honor an interment contract by declining to inter an Indian. The interment contract, held by the latter's wife with the cemetery, contained a restrictive covenant limiting burials to Caucasians. The Iowa court denied relief on the ground that *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), held a restrictive covenant was only unenforceable, not void, and, there-

[3] 245 Iowa 147, 60 N. W. 2d 110 (1953).

fore, judicial recognition of it as a defense, i.e., as giving the right to stand on its terms against one who sued in violation of its terms, was not state action.

The analogy Eagle seeks to make with the *Rice* defense fails. Eagle was not standing on a right to exclude "any and all," as the court below at one point implied it had a right at common law to do. Eagle's stand was that it had a right to exclude appellant because the statute authorizes the exclusion of Negroes. This contention the court below adopted: "We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 Del. C., §1501, which does not compel the operator of a restaurant to give service to all persons seeking such," i.e., authorizes exclusion of offensive persons, meaning, in the context of the case, only Negroes. If the statute declared that, such legislative action is barred by the Fourteenth Amendment. If it has such meaning only because this meaning is read into it and enforced by the court below, that judicial action also is barred by the Fourteenth Amendment. This is the essence of the appeal.

We would make it clear, then, that this appeal is not from Eagle's belated assertion in its brief that the basis of its "right to discriminate" is the common law, but from the action of the court below in effectively giving validity to a state statute, which, on pleading and argument by appellees, the court held to authorize racial discrimination. Even if the court had effectuated a so-called common-law rule authorizing unreasonable discrimination, this would be state action violative of the Fourteenth Amendment, of which long ago it was declared:

> "It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws."
>
> *Civil Rights Case*, 109 U. S. 3, 11 (1883).

(d) If the Delaware General Assembly had employed language stating that a restaurateur might exclude Negroes, qua Negroes, such discriminatory state legislative action unquestionably would violate the equal protection clause of the Fourteenth Amendment. See *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (4th Cir., 1959), where it is clearly indicated that if there had been a Virginia statute requiring the exclusion of Negroes from public restaurants, it would be barred by the Fourteenth Amendment. While once it was accepted, without proof, that there was a rational basis for legislative racial classification, as in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896),[4] where racial classification was upheld in a Louisiana statute requiring racial segregation in public transportation, any notion that a rational basis exists today is seriously impugned by the rejection of such legislative classification in *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954), and its subsequent application to theatres, *Muir* v. *Louisville Park Theatrical Ass'n.*, 347 U. S. 971 (1954), public housing and a variety of situations referred to in appellant's opening brief.

With respect to food service in interstate railway and bus[5] travel, the Interstate Commerce Act is construed to prohibit racial classification, even though an explicit prohibition in that regard is not written into the language of the act. In an industry as pervasive, commonplace and vitally important in our modern, industrialized society as the purveyance of food in prepared meals, it is obvious that a state should not be permitted to make or enforce a classification which would deny to an ethnic group equal treatment in the right to such an essential.

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[4] Cf. *Browder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala., 1956), aff'd, 352 U. S. 903 (1956), holding a law permitting racial segregation in intrastate transportation unconstitutional under the Fourteenth Amendment.

[5] *Henderson* v. *United States*, 339 U. S. 816, 70 S. Ct. 843.

[6] *Boynton* v. *Virginia*, 81 S. Ct. 182.

II. Equal Protection Is Not to Be Avoided by Resort to Labels

Appellees, striving to find a touchpiece to dissipate the constitutional restrictions imposed on state action in relation to public property, seize upon a remark in *Derrington* v. *Plummer*,[1] that "in certain circumstances" (Authority's brief, p. 11), a lease could be made by a county to a private person and the leased property be unaffected by the Fourteenth Amendment. See also Eagle's brief, pp. 12-13. But this *dictum* the court rigidly circumscribes and limits to "surplus" property, not needed by the governmental entity. That is not the situation here, where the statute creating the Authority imposes the limitation that such leasing "be necessary and feasible for the financing and operation" of the parking facility.[2] Since it is clear that the public purpose of the Authority could not be achieved without the rental income from the space occupied by Eagle, that space could not accurately be denominated "surplus."

Surplus property not being involved here, any authority which appellee Eagle may deduce from *Ashwander* v. *Tennessee Valley Authority*,[3] which relates to the permissibility of disposal by the federal government of excess, or surplus, electric energy (generated as a by-product to production of war munitions and incidental to federal control over navigation), has no application here. Nor does that case have any element of discriminatory denial of access to government property or discriminatory use of property in the ownership or control of which the hand of government continues.

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[1] 240 F. 2d 922 (5th Cir. 1956).

[2] 22 Del. C., § 504, Appellant's Appendix, p. 48.

[3] 297 U. S. 288, 56 S. Ct. 466 (1936), cited at p. 13, Eagle's Brief.

Eagle points to *Dorsey* v. *Stuyvesant Town Corp.*[10] as inconsistent with the definition of "state action" in *Cooper* v. *Aaron*, 358 U. S. 1 (1958), cited in appellant's opening brief, p. 15. This Court in that case declared "state participation through any arrangement, management, funds or property" is sufficient to invoke Fourteenth Amendment restraint against racial discrimination. In *Dorsey* the Court of Appeals of New York rejected the contention that benefits accruing to an urban redevelopment corporation through acquisition of land with the aid of the state's power of eminent domain, together with the closure and conveyance of streets and tax exemption, denoted governmental character sufficient to make applicable the Fourteenth Amendment to ban racial discrimination in the renting of dwellings erected by the corporation on that land. We suggest that in the light of expanding concepts of state and municipal functions and corresponding expansion of the concept of state action, the four-three *Dorsey* decision of more than a decade ago is now incorrect. The aid given by the city to the redevelopment corporation specifically to accomplish the city's purpose of removing substandard and insanitary structures and providing decent housing was substantial, and there was sufficient city participation to make the Fourteenth Amendment applicable. The later decision in *64th Street Residences* v. *City of New York*,[11] unanimously entered by the same court, without mentioning the *Dorsey* opinion, by implication weakens its authority on the "state action" point. In the latter case, the court indicates that if Fordham University, a Catholic institution, alone were excluded from bidding on land acquired by the city for redevelopment purposes (which were akin to those in the *Dorsey* case), the University would be deprived of constitutional rights under the Fourteenth, as well as the First, Amend-

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[10] 299 N. Y. 512, 87 N. E. 2d 541 (1949).

[11] 4 N. Y. 2d 268, 150 N. E. 2d 396 (1958).

ment. Certainly Fourteenth Amendment rights would not have been involved if the urban redevelopment plan did not involve state action.

Finally, the theory that there is "special" or "extra" state-owned property free of constitutional prohibitions against racial discrimination, which Eagle advances, is, on its face, unsound. Obviously it contains the real probability and danger that by mere indulgence in invidious semantics, i.e., by terming a government facility "special" or "extra" (or "extra-special") discriminatory denial of use may be effectuated. This is precisely the predicament in which appellant finds himself with respect to the restaurant in this case. The statute was enforced to authorize his exclusion from the restaurant because, in the construction the court makes of the vague language of the statute, appellant, simply, as a Negro, is "offensive". Surely, terms of such uncertain content should not be further enlisted to avoid accordance of the equal protection of the laws, and the effect given to such language by the court below should be rejected by the invalidation of the statute by this Court.

Respectfully submitted,

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February 16, 1961

SUPREME COURT OF THE UNITED STATES

No. 164.—October Term, 1960.

William H. Burton, Appellant, v. Wilmington Parking Authority, et al. | On Appeal From the Supreme Court of Delaware.

[April 17, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

In this action for declaratory and injunctive relief it is admitted that the Eagle Coffee Shoppe, Inc., a restaurant located within an off-street automobile parking building in Wilmington, Delaware, has refused to serve appellant food or drink solely because he is a Negro. The parking building is owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Authority's lessee. Appellant claims that such refusal abridges his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Delaware has held that Eagle was acting in "a purely private capacity" under its lease; that its action was not that of the Authority and was not, therefore, state action within the contemplation of the prohibitions contained in that Amendment. It also held that under 24 Del. Code, § 1501,[1] Eagle was a restaurant, not an inn, and that as

[1] The statute provides that: "No keeper of an inn, tavern, hotel or restaurant or other place of public entertainment or refreshment of travelers, guests or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers and would injure his business. The term 'customers' shall be taken to include all who have occasion for entertainment or refreshment."

such it "is not required [under Delaware law] to serve any and all persons entering its place of business." — Del. —, 157 A. 2d 894 (1960). On appeal here from the judgment as having been based upon a statute construed unconstitutionally, we postponed consideration of the question of jurisdiction under 28 U. S. C. § 1257 (2) to the hearing on the merits. 364 U. S. 810. We agree with the respondents that the appeal should be dismissed and accordingly the motion to dismiss is granted. However, since the action of Eagle in excluding appellant raises an important constitutional question, the papers whereon the appeal was taken are treated as a petition for a writ of certiorari, 28 U. S. C. § 2103, and the writ is granted. 28 U. S. C. § 1257 (3). On the merits we have concluded that the exclusion of appellant under the circumstances shown to be present here was discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Authority was created by the City of Wilmington pursuant to Tit. 22, Del. Code, c. 5, §§ 501–515. It is "a public body corporate and politic, exercising public powers of the State as an agency thereof." § 504. Its statutory purpose is to provide adequate parking facilities for the convenience of the public and thereby relieve the "parking crisis, which threatens the welfare of the community. . . ." § 501 (7), (8) and (9). To this end the Authority is granted wide powers including that of constructing or acquiring by lease, purchase or condemnation, lands and facilities, and that of leasing "portions of any of its garage buildings or structures for commercial use by the lessee, where, in the opinion of the Authority, such leasing is necessary and feasible for the financing and operation of such facilities." § 504 (a). The Act provides that the rates and charges for its facilities must be reasonable and are to be determined exclusively by the Authority "for the purposes of providing for the payment of the

expenses of the Authority, the construction, improvement, repair, maintenance, and operation of its facilities and properties, the payment of the principal of and interest on its obligations, and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such obligations or with the city." § 504 (b)(8). The Authority has no power to pledge the credit of the State of Delaware but may issue its own revenue bonds which are tax exempt. Any and all property owned or used by the Authority is likewise exempt from state taxation.

The first project undertaken by the Authority was the erection of a parking facility on Ninth Street in downtown Wilmington. The tract consisted of four parcels, all of which were acquired by negotiated purchases from private owners. Three were paid for in cash, borrowed from Equitable Security Trust Company, and the fourth, purchased from Diamond Ice and Coal Company, was paid for "partly in Revenue Bonds of the Authority and partly in cash [$934,000] donated by the City of Wilmington, pursuant to 22 Del. C., c. 5. . . . Subsequently the City of Wilmington gave the Authority $1,822,827.69 which sum the Authority applied to the redemption of the Revenue Bonds delivered to Diamond Ice & Coal Co. and to the repayment of the Equitable Security Trust Company loan."

Before it began actual construction of the facility, the Authority was advised by its retained experts that the anticipated revenue from the parking of cars and proceeds from sale of its bonds would not be sufficient to finance the construction costs of the facility. Moreover, the bonds were not expected to be marketable if payable solely out of parking revenues. To secure additional capital needed for its "debt-service" requirements, and thereby to make bond financing practicable, the Authority decided it was necessary to enter long-term leases with

responsible tenants for commercial use of some of the space available in the projected "garage building." The public was invited to bid for these leases.

In April 1957 such a private lease, for 20 years and renewable for another 10 years, was made with Eagle Coffee Shoppe, Inc., for use as a "restaurant, dining room, banquet hall, cocktail lounge and bar and for no other use and purpose." The multi-level space of the building which was let to Eagle, although "within the exterior walls of the structure, has no marked public entrance leading from the parking portion of the facility into the restaurant proper . . . [whose main entrance] is located on Ninth Street." In its lease the Authority covenanted to complete construction expeditiously, including completion of "the decorative finishing of the leased premises and utilities therefor, without cost to Lessee," including necessary utility connections, toilets, hung acoustical tile and plaster ceilings; Vinyl asbestos, ceramic tile and concrete floors; connecting stairs and wrought iron railings; and wood-floored show windows. Eagle spent some $220,000 to make the space suitable for its operation and, to the extent such improvements were so attached to realty as to become part thereof, Eagle to the same extent enjoys the Authority's tax exemption.

The Authority further agreed to furnish heat for Eagle's premises, gas service for the boiler room, and to make, at its own expense, all necessary structural repairs, all repairs to exterior surfaces except store fronts and any repairs caused by lessee's own act or neglect. The Authority retained the right to place any directional signs on the exterior of the let space which would not interfere with or obscure Eagle's display signs. Agreeing to pay an annual rental of $28,700, Eagle covenanted to "occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority." Its lease,

however, contains no requirement that its restaurant services be made available to the general public on a nondiscriminatory basis, in spite of the fact that the Authority has power to adopt rules and regulations respecting the use of its facilities except any as would impair the security of its bondholders. § 511.

Other portions of the structure were leased to other tenants, including a bookstore, a retail jeweler, and a food store. Upon completion of the building, the Authority located at appropriate places thereon official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags.

In August 1958 appellant parked his car in the building and walked around to enter the restaurant by its front door on Ninth Street. Having entered and sought service, he was refused it. Thereafter he filed this declaratory judgment action in the Court of Chancery. On motions for summary judgment, based on the pleadings and affidavits, the Chancellor concluded, contrary to the contentions of respondents, that whether in fact the lease was a "device" or was executed in good faith, it would not "serve to insulate the public authority from the force and effect of the Fourteenth Amendment." 150 A. 2d 197. He found it not necessary, therefore, to pass upon the rights of private restaurateurs under state common and statutory law, including 24 Del. Code § 1501. The Supreme Court of Delaware reversed, as we mentioned above, holding that Eagle "in the conduct of its business, is acting in a purely private capacity." It, therefore, denied appellant's claim under the Fourteenth Amendment. Upon reaching the application of state law, it held, contrary to appellant's assertion that Eagle maintained an inn, that Eagle's operation was "primarily a restaurant and thus subject to the provisions of *24 Del. C. § 1501*, which does not compel the operator of a restaurant to give service to all persons seeking such." Delaware's

highest court has thus denied both the equal protection claims of the appellant as well as his state-law contention concerning the applicability of § 1501.

On the jurisdictional question, we agree that the judgment of Delaware's court does not depend for its ultimate support upon a determination of the constitutional validity of a state statute, but rather upon the holding that on the facts Eagle's racially discriminatory action was exercised in "a purely private capacity" and that it was, therefore, beyond the prohibitive scope of the Fourteenth Amendment.

The *Civil Rights Cases*, 109 U. S. 3 (1883), "embedded in our constitutional law" the principle "that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Chief Justice Vinson in *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948). It was language in the opinion in the *Civil Rights Cases*, *supra*, that phrased the broad test of state responsibility under the Fourteenth Amendment, predicting its consequence upon "State action of every kind . . . which denies . . . the equal protection of the laws." At p. 11. And only two Terms ago, some 75 years later, the same concept of state responsibility was interpreted as necessarily following upon "state participation through any arrangement, management, funds or property." *Cooper* v. *Aaron*, 358 U. S. 1, 4 (1958). It is clear, as it always has been since the *Civil Rights Cases*, *supra*, that "individual invasion of individual rights is not the subject matter of the amendment," at p. 11, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. Because the virtue of the right to equal

protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is "an impossible task" which "this Court has never attempted." *Kotch* v. *Pilot Comm'rs*, 330 U. S. 552, 556. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

The trial court's disposal of the issues on summary judgment has resulted in a rather incomplete record, but the opinion of the Supreme Court as well as that of the Chancellor present the facts in sufficient detail for us to determine the degree of state participation in Eagle's refusal to serve petitioner. In this connection the Delaware Supreme Court seems to have placed controlling emphasis on its conclusion, as to the accuracy of which there is doubt, that only some 15% of the total cost of the facility was "advanced" from public funds; that the cost of the entire facility was allocated three-fifths to the space for commercial leasing and two-fifths to parking space; that anticipated revenue from parking was only some 30.5% of the total income, the balance of which was expected to be earned by the leasing; that the Authority had no original intent to place a restaurant in the building, it being only a happenstance resulting from the bidding; that Eagle expended considerable moneys on furnishings; that the restaurant's main and marked public entrance is on Ninth Street without any public entrance direct from the parking area; and that "the only connection Eagle has with the public facility . . . is the furnishing of the sum of $28,700

annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise." 157 A. 2d 894, 901. While these factual considerations are indeed validly accountable aspects of the enterprise upon which the State has embarked, we cannot say that they lead inescapably to the conclusion that state action is not present. Their persuasiveness is diminished when evaluated in the context of other factors which must be acknowledged.

The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." 22 Del. Code, c. 5, §§ 501-514. The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. Assuming that the distinction would be significant, cf. *Derrington* v. *Plummer*, 240 F. 2d 922, 925, the commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. Guests of the restaurant are afforded a convenient place to park their automobiles, even if they cannot enter the restaurant directly from the parking area. Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities. Should any improvements effected in the leasehold by Eagle become

part of the realty, there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency. Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but are indispensable elements in the financial success of a governmental agency.

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings. As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts

of Appeals do not depend upon such a distinction.[2] By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very "largeness" of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "Differences in circumstances [which] beget appropriate differences in law." *Whitney* v. *Tax Comm'n*, 309 U. S. 530, 542. Specifically defining the limits of our inquiry, what we hold today is that when

[2] See *Aaron* v. *Cooper*, 261 F. 2d 97 (C. A. 8th Cir.); *City of Greensboro* v. *Simkins*, 246 F. 2d 425 (C. A. 4th Cir.), affirming 149 F. Supp. 562 (D. C. M. D. N. C.); *Derrington* v. *Plummer*, 240 F. 2d 922 (C. A. 5th Cir.); *Coke* v. *City of Atlanta*, 184 F. Supp. 579 (D. C. N. D. Ga.); *Jones* v. *Marva Theatres*, 180 F. Supp. 49 (D. C. D. Md.); *Tate* v. *Department of Conservation*, 133 F. Supp. 53 (D. C. E. D. Va.), aff'd, 231 F. 2d 615 (C. A. 4th Cir.); *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (D. C. E. D. Va.); *Lawrence* v. *Hancock*, 76 F. Supp. 1004, (D. C. S. D. W. Va.); and see *Muir* v. *Louisville Park Theatrical Assn.*, 347 U. S. 971, vacating and remanding 202 F. 2d 275 (C. A. 6th Cir.).

a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

The judgment of the Supreme Court of Delaware is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 164.—October Term, 1960.

William H. Burton, Appellant, v. Wilmington Parking Authority, et al.	On Appeal From the Supreme Court of Delaware.

[April 17, 1961.]

Mr. Justice Stewart, concurring.

I agree that the judgment must be reversed, but I reach that conclusion by a route much more direct than the one traveled by the Court. In upholding Eagle's right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which permits the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers . . . ." * There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment. I think, therefore, that the appeal was properly taken, and that the statute, as authoritatively construed by the Supreme Court of Delaware, is constitutionally invalid.

*24 Del. Code, § 1501. The complete text of the statute is set out in the Court opinion at note 1.

SUPREME COURT OF THE UNITED STATES

No. 164.—October Term, 1960.

William H. Burton, Appellant. v. Wilmington Parking Authority.	On Appeal From the Supreme Court of Delaware.

[April 17, 1961.]

Mr. Justice Frankfurter, dissenting.

According to my brother Stewart, the Supreme Court of Delaware has held that one of its statutes, 24 Del. Code, § 1501, sanctions a restaurateur denying service to a person solely because of his color. If my brother is correct in so reading the decision of the Delaware Supreme Court his conclusion inevitably follows. For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment. My brother Harlan also would find the claim of invalidity of the statute decisive if he could read the state court's construction of it as our brother Stewart reads it. But for him the state court's view of its statute is so ambiguous that he deems it necessary to secure a clarification from the state court of how in fact it did construe the statute.

I certainly do not find the clarity that my brother Stewart finds in the views expressed by the Supreme Court of Delaware regarding 24 Del. Code § 1501. If I were forced to construe that court's construction, I should find the balance of considerations leading to the opposite conclusion from his, namely, that it was merely declaratory of the common law and did not give state sanction to refusing service to a person merely because he is colored. The Court takes no position regarding the statutory meaning which divides my brothers Harlan and

STEWART. Clearly it does not take MR. JUSTICE STEWART'S view of what the Supreme Court of Delaware decided. If it did, it would undoubtedly take his easy route to decision and not reach the same result by its much more circuitous route.

Since the pronouncement of the Supreme Court of Delaware thus lends itself to three views, none of which is patently irrational, why is not my brother HARLAN'S suggestion for solving this conflict the most appropriate solution? Were we to be duly advised by the Supreme Court of Delaware that MR. JUSTICE STEWART is correct in his reading of what it said, there would be an easy end to our problem. There would be no need for resolving the problems in state-federal relations with which the Court's opinion deals. If, on the other hand, the Delaware court did not mean to give such an invalidating construction to its statute, we would be confronted with the problems which the Court now entertains for decision, unembarrassed by disregard of a simpler issue. This would involve some delay in adjudication. But the time would be well spent, because the Court would not be deciding serious questions of constitutional law any earlier than due regard for the appropriate process of constitutional adjudication requires.

Accordingly, I join in MR. JUSTICE HARLAN'S proposed disposition of the case without intimating any view regarding the question, prematurely considered by the Court, as to what constitutes state action.

SUPREME COURT OF THE UNITED STATES

No. 164.—October Term, 1960.

William H. Burton, Appellant, v. Wilmington Parking Authority.	On Appeal From the Supreme Court of Delaware.

[April 17, 1961.]

Mr. Justice Harlan, whom Mr. Justice Whittaker joins, dissenting.

The Court's opinion, by a process of first undiscriminatingly throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of "state action."

I find it unnecessary, however, to inquire into the matter at this stage, for it seems to me apparent that before passing on the far-reaching constitutional questions that may, or may not, be lurking in this judgment, the case should first be sent back to the state court for clarification as to the precise basis of its decision. In deciding this case the Delaware Supreme Court, among other things, said:

> "It [Eagle] acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in 24 *Del. C.*, § 1501 with respect to restaurant keepers. 10 *Am. Jur., Civil Rights*, §§ 21, 22; 52 *Am. Jur., Theatres*, § 9; *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845. We, accordingly, hold that the

operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment."

If in the context of this record this means, as my Brother STEWART suggests, that the Delaware court construed this state statute "as authorizing discriminatory classification based exclusively on color," I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment. It would then be quite unnecessary to reach the much broader questions dealt with in the Court's opinion. If, on the other hand, the state court meant no more than that under the statute, as at common law, Eagle was free to serve only those whom it pleased, then, and only then, would the question of "state action" be presented in full-blown form.

I think that sound principles of constitutional adjudication dictate that we should first ascertain the exact basis of this state judgment, and for that purpose I would either remand the case to the Delaware Supreme Court, see *Musser* v. *Utah*, 333 U. S. 95; cf. *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167, or hold the case pending application to the state court for clarification. See *Herb* v. *Pitcairn*, 324 U. S. 117. It seems to me both unnecessary and unwise to reach issues of such broad constitutional significance as those now decided by the Court, before the necessity for deciding them has become apparent.

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*24 Del. C., § 1501, reads as follows:

"No keeper of an inn, tavern, hotel or restaurant or other place of public entertainment or refreshment of travelers, guests or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers and would injure his business."